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No. ____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,
Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Case Nos. 96-50847 and 96-10818

PETITIONER'S APPENDIX VOLUME II

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DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATIONS OF

SUN WORLD, NATIONAL ASSOCIATION, EL PASO, TEXAS

August 2, 1996

I. INTRODUCTION

On May 9, 1996, Sun World, National Association, El Paso, Texas ("Sun World") filed an application with the Office of the Comptroller of the Currency ("OCC") for approval to change the location of its main office from El Paso, El Paso County, Texas, to Santa Teresa, Dona Ana County, New Mexico, under 12 U.S.C. § 30 (the "Relocation Application"). The location in Santa Teresa is approximately one-half mile from the city limits of El Paso. During and after the relocation of its main office, Sun World would retain its two existing branches in El Paso. On May 9, 1996, Sun World also applied to the OCC for approval, following the relocation of its main office, to establish a new branch at the former location of its main office in El Paso under 12 U.S.C. § 36(c) (the "Branch Application").

Sun World has approximately $134 million in assets and $111 million in deposits and currently operates two branches in El Paso. Sun World is a subsidiary of NationsBank Texas

Bancorporation, Inc., which is in turn a subsidiary of NationsBank Corporation, a multi-state bank holding company headquartered in Charlotte, North Carolina.

Notice of the Applications was published in a general circulation newspaper in El Paso on May 8, 1996. In addition, Sun World sent copies of the Applications to the banking commissioners of Texas and New Mexico. On May 20, 1996, and on June 10, 1996, the Texas Bank Commissioner ("Texas Bank Commissioner" or "the Commissioner") wrote the OCC to oppose the Applications, objecting especially to Sun World's retention of its existing branches in Texas when it relocates its main office to New Mexico. On June 4, 1996, the New Mexico Director of the Financial Institutions Division ("New Mexico Bank Commissioner") also wrote the OCC to oppose the Applications, making essentially the same points as the Texas Commissioner. On June 4, 1996, the Independent Bankers Association of Texas ("IBAT") also wrote the OCC to oppose the Applications. Sun World responded to the above objections in letters dated June 6, June 11, and June 20, 1996. The objections are addressed in the relevant portions of the discussion below, especially at pages 22-34, 36-37, and 38-41.

Recently, the Texas Bank Commissioner brought suit against Sun World in the Western District of Texas to litigate the banking operations Sun World proposes in its Applications, even before the Applications had been acted on by the OCC. See Ghiglieri v. Sun World, N.A., EP-96-CA-324 (W.D. Tex., Complaint filed July 18, 1996). With the issuance of our Decision today approving Sun World's Applications, the OCC will move to intervene in this case.

The Texas Bank Commissioner's objections to these Applications are similar to her objections to an earlier interstate

main office relocation from Arkansas into Texas that is the subject of a lawsuit. In that case, the district court concluded that the OCC's interpretation of 12 U.S.C. § § 30 & 36 as permitting a national bank to keep its existing branches when it relocates its main office across state lines was erroneous. See Ghiglieri v. Ludwig, No. 3:95-CV-2001-H, 1996 U.S. Dist. LEXIS 8321 (N.D. Tex., May 22, 1996), appeal docketed, No. 96-10818 (5th Cir. July 10, 1996)("Ghiglieri")[1]. The OCC believes the district court opinion in Ghiglieri is incorrect as a matter of law for several reasons. Most significantly, the court did not follow the language of the statutes in effect at the time of the OCC's decision and ignored highly relevant recent legislative history which illuminates the literal language of sections 30 and 36. In addition, the court failed to follow the standards set by the United States Supreme Court for judicial review of an agency's construction of the statutes it administers. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. __ (1995); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). These standards were recently, emphatically, re-affirmed by the High Court in a decision handed down subsequent to the district court's opinion. See Smiley v. Citibank (South Dakota), N.A., No. 95-860, 517 U.S. __, 135 L.Ed.2d 25 (June 3, 1996). The district court opinion is discussed at pages 12, 21, 22-34, 36-37, and 39.

The judgment entered in Ghiglieri does not limit the OCC's ability to act on Sun World's Applications, however.

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[1] The Ghiglieri court was reviewing the OCC's Decision on the Applications of Commercial National Bank of Texarkana (OCC Corporate Decision No. 95-11, March 8, 1995) ("OCC Commercial National Bank Decision").

The judgment enjoins the OCC only from approving other applications like the one at issue in that case -- i.e., to relocate a national bank's main office from Arkansas into Texas, where the bank would continue, after the relocation, to maintain interstate branches in Arkansas. In the proceedings in the Ghiglieri case, the Texas Bank Commissioner twice tried, but failed, to obtain an order that would have covered other interstate relocations involving Texas, such as Sun World's.

First, the Commissioner offered a proposed judgment that would have enjoined the OCC from approving any further bank application to relocate its main office while continuing to maintain interstate branches in violation of Texas law. See Commissioner's Proposed Order (May 31, 1996). The OCC offered a narrower proposed order, limiting the order to the fact pattern before the court (i.e., branch retention following a main office relocation from Arkansas into Texas). See OCC's Proposed Order and Memorandum in Support (June 7, 1996). The court adopted the OCC's narrower order. See Judgment (June 10, 1996).

Second, after the narrower order was entered, the Commissioner tried to amend the judgment to enjoin the OCC from approving any further application to relocate a national bank's main office into or from Texas where the bank would maintain interstate branches, where the maintenance of the branches is based on branch retention under section 30. See Commissioner's Motion to Amend Judgment (June 17, 1996). In her motion to amend, the Commissioner specifically referred to the pending application by Sun World to relocate from Texas to New Mexico. Nevertheless, the court denied the Commissioner's motion to amend and left the original narrower order in place. See Order Denying Plaintiff's Motion to Amend

Judgment (June 26, 1996). Thus, the Ghiglieri court had the opportunity to include the Sun World Applications within the scope of its Judgment, but did not.

The provisions of the Riegle-Neal Act[2] governing interstate main office relocations and branch retention create a highly unusual interplay between potential OCC action on applications before us and the status of pending litigation. As discussed below at pages 17-19 and 28-29, the Riegle-Neal provisions apply a different, and narrower, standard for permissible branch retention in interstate main office relocations that occur after May 31, 1997, than for those that occur until then. If a national bank, such as Sun World, relocates its main office from one state to another after May 31, 1997, its power to retain its existing branches in the first state will be determined by the more limited standard governing relocations after that date. In other words, a relocation with branch retention that could be permissible under today's standards might become impermissible under the post-May 31, 1997, standards.[3] It is

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[2]Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994) (codified in scattered sections of 12 U.S.C.) (the "Riegle-Neal Act").

[3] At the present time, Sun World's is the only pending interstate main office application involving Texas. A small Oklahoma bank had applied before Sun World, but it recently withdrew its application. However, there may be other banks that might consider such applications but are deterred by the legal uncertainty and potential risk of litigation. Thus, it is desirable to have the issue resolved in a timely fashion before May 31, 1997.

the scope of the current standard that is at issue in the Ghiglieri case.

At the present time, however, it is impossible to say whether the scope of the current standard will be resolved by the courts before the standard expires on May 31, 1997. The OCC is appealing the decision in Ghiglieri to the United States Court of Appeals for the Fifth Circuit. See Notice of Appeal (July 10, 1996). Moreover, because of the short time remaining until May 31, 1997, and the need to have the law settled before then, the OCC will move for an expedited appeal. However, at this time it is uncertain when the appeal will be heard and decided, and when any subsequent review of that decision would conclude. In particular, it is not certain that the issue will be resolved before June 1, 1997. If the OCC declined to act on Sun World's applications until these issues were finally determined on appeal, the time might extend past May 31, 1997. Then, even if the OCC prevailed, Sun World's ability to take action determined to be validly authorized under pre-May 31, 1997, law would be foreclosed. These unique circumstances make it necessary for the OCC to act, so that Sun World is not deprived of a right it, and the OCC, believes it has under current federal law and so that the issues in dispute are able to be fairly presented for judicial resolution. The validity of the OCC's statutory construction and Sun World's claim that it can relocate to Santa Teresa and retain the two existing branches in El Paso may then be determined in the courts.

II. LEGAL AUTHORITY

These Applications involve a series of two transactions:

(1) The relocation of a national bank's main office from El Paso, Texas, to Santa Teresa, New Mexico, and the bank's retention of its two existing branches in El Paso, under 12 U.S.C. § 30.

(2) The relocated bank's establishment of a new branch at the former site of its main office in El Paso, under 12 U.S.C. § 36(c).

These transactions present but one central legal issue: the power of a national bank to retain its existing branches when it moves its main office. The interstate relocation of the main office in itself is well-established, as set out at pages 7-12. If the branch retention in the relocation is authorized, then Sun World can become an interstate national bank (i.e., a bank with branches in another state). Then, in the second transaction, the statutes governing the establishment of new branches by national banks are simply applied to the interstate bank. But, without the branch retention in the relocation transaction, there is no basis to proceed to the second transaction.

Thus, the central legal issue is a national bank's power to retain its existing branches in an interstate relocation of its main office. In 1994, Congress expressly addressed this very issue and confirmed the OCC's prior interpretation of the statutes. In two decisions in early 1994, the OCC determined that the bank could continue to operate its existing branches in its original state when it relocated its main office to another state under section 30, without regard to section 36 or state law.[4]

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[4] See Decision on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland National Bank, Baltimore, Maryland (OCC Corporate Decision No. 94-5, February 4, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695 ("OCC

We based this statutory conclusion on consideration of many factors, including an extensive review of the statutes, legislative history, case law, the development of the statutes, and the impact of branch retention vowel non on the exercise of the primary statutory right to move the main office. We found nothing that required existing branches to be divested in a main office relocation, and concluded a congressional intent to require such divestiture could not be inferred from silence. The OCC's statutory construction of section 30 before the Riegle-Neal Act is summarized at pages 14-16.

In the Riegle-Neal Act, Congress visited section 30 after the earlier OCC decisions and added new language to 12 U.S.C. § § 30 & 36 to clarify and govern the power of national banks to have interstate branches through retaining existing branches in an interstate main office relocation. This action recognized that,

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NationsBank/Maryland National Decision"); Decision on the Applications of First Fidelity Bank, N.A., Pennsylvania, Philadelphia, Pennsylvania, and First Fidelity Bank, N.A., New Jersey, Newark, New Jersey (OCC Corporate Decision No. 94-04, January 10, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 ("OCC First Fidelity/New Jersey Decision"). There were also other decisions before the Riegle-Neal Act that involved only the interstate relocation of a bank's main office (i.e., the bank did not have branches to retain). See Decision on the Applications of the First National Bank of Polk County (OCC Corporate Decision No. 94-21, April 28, 1994) (relocation from Tennessee into Georgia); Decision on the Application of the First National Bank of Spokane (1991) (relocation from Washington into Idaho); Decision on the Application of South Trust National Bank (1989) (relocation from Alabama into Georgia); Decision on the Application of the Bank of New Jersey, N.A. (1986) (relocation from New Jersey into Pennsylvania) ("OCC Bank of New Jersey Decision"); Decision on the Application of Mark Twain Bank, N.A. (1985) (relocation from Missouri into Kansas)("OCC Mark Twain Decision").

under section 30, national banks had such power before, and then limited it, beginning on June 1, 1997, to co-ordinate the section 30 power with the new Riegle-Neal framework for interstate branches. *Section 30, as so amended, is the statute that applies to transactions today*. Before the Riegle-Neal Act, nothing in sections 30 or 36 required the constructive divestiture of existing lawful branches in a main office relocation. In the Riegle-Neal Act, Congress added such a requirement, but only for certain interstate relocations and only to begin on June 1, 1997. Congressional action on section 30 in the context of the prior OCC interpretation is especially compelling. Thus, in the relocation of its main office from one state to another, the power of a national bank to retain its existing branches under section 30 is now clearly established. Section 30 and the Riegle-Neal Act are discussed at pages 17-34.

Once Sun World is an interstate national bank with two branches in El Paso, the establishment of the new branch in El Paso at the former site of the main office is evaluated under the statutes, cases, and prior OCC decisions for such transactions by an interstate bank. Before the Riegle-Neal Act, there had been a number of decisions applying the applicable federal branching and merger statutes to transactions by interstate national banks.[5]

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[5] The OCC First Fidelity/New Jersey Decision and the OCC NationsBank/Maryland National Decision had involved such transactions after the relocation, and there were also several other applications that did not involve a relocation but did involve interstate merger and branching transactions. See Decision on the Application to Merge Girard Bank, Bala Cynwyd, Pennsylvania, in Heritage Bank, N.A., Jamesburg, New Jersey, with the Title of Mellon Bank (East) N.A. (March 27, 1984), reprinted in [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶99,925 ("OCC Mellon Decision") (in 1984 Heritage had a grandfathered branch in Philadelphia; the 1984 transaction was not consummated

In the pre-Riegle-Neal decisions, the OCC determined that, when the federal statutes refer to state law, they were intended to apply state laws on a state-by-state basis for transactions in each state by an interstate national bank. That is, an interstate bank could establish new branches within each state under section 36(c), depending upon that state's law for in-state branching for its own state-chartered banks. In the Riegle-Neal Act, Congress left these statutes unchanged after this OCC interpretation and, in the new Riegle-Neal interstate provisions, adopted a similar state-by-state framework for subsequent transactions by a Riegle-Neal interstate bank. Sun World's establishment of the new branch in El Paso is discussed at pages 34-37.

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and Heritage later became part of Midlantic National Bank); Decision on the Application of State Savings Bank, Southington, Connecticut, to Convert into a National Banking Association, State Savings Bank, N.A., and Merge into Connecticut National Bank, Hartford, Connecticut (OCC Merger Decision No. 91-07, April 8, 1991), available in 1991 OCC Ltr. LEXIS 73 ("OCC Shawmut Decision") (both banks owned by Shawmut National Corporation; at the time of conversion State Savings Bank had branches in Rhode Island); Decision on the Application for the Merger of First Peoples National Bank, Kingston, Pennsylvania, with and into First Fidelity Bank, N.A., Salem, New Jersey (OCC Corporate Decision No. 94-07, February 23, 1994) ("OCC First Peoples Decision"); Decision on the Applications to Merge NationsBank of D.C., N.A., Maryland National Bank, and NationsBank of Maryland, N.A. (OCC Corporate Decision No. 94-22, April 29, 1994) ("OCC NationsBank/D.C.-Maryland Decision"); Decision on the Application for the Merger of Continental Bank, Norristown, Pennsylvania, into Midlantic National Bank, Newark, New Jersey (OCC Corporate Decision No. 94-37, August 12, 1994) ("OCC Midlantic Decision").

Since passage of the Riegle-Neal Act, the OCC has applied these statutes in the foregoing manner in many applications, including decisions in October 1994 shortly after the enactment of the Riegle-Neal Act. In particular, in one decision, a state bank commissioner objected to the transaction, arguing that the maintenance of interstate branches in the state would violate a state law and also raising interpretive questions under the Riegle-Neal Act.[6] In that decision, because of the

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[6] See Decision of the Office of the Comptroller of the Currency on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest, N.A. (OCC Corporate Decision No. 95-05, February 16, 1995), reprinted in Fed. Banking L. Rep. (CCH) ¶ 90,474 ("OCC Bank Midwest Decision"). Other decisions after the Riegle-Neal Act include: Decision on the Applications of National Westminster Bank USA and National Westminster Bank NJ (OCC Corporate Decision No. 94-43, October 20, 1994) ("OCC NatWest Decision"); Decision on the Applications of First Fidelity Bank, N.A., and The Bank of Baltimore (OCC Corporate Decision No. 94-47, November 4, 1994) ("OCC First Fidelity/Baltimore Decision"); Decision on the Application to Merge Chase Savings Bank into The Chase Manhattan Bank, N.A. (OCC Corporate Decision No. 95-08, February 10, 1995) ("OCC Chase Decision"); Decision on the Applications of American National Bank and Trust Company of Wisconsin and American National Bank and Trust Company of Chicago (OCC Corporate Decision No. 95-12, March 8, 1995); Decision on the Applications of PNC Bank, Northern Kentucky, N.A. and PNC Bank, Ohio, N.A. (OCC Corporate Decision No. 95-13, March 14, 1995) ("OCC PNC/Kentucky Decision"); Decision on the Applications of Firstar Bank Quad Cities, N.A., and Firstar Bank Davenport, N.A. (OCC Corporate Decision No. 95-16, April 27, 1995); Decision on the Application to Merge Bank and Trust Company of Old York Road into Midlantic Bank, N.A. (OCC Corporate Decision No. 95-18, May 25, 1995) ("OCC Midlantic/Old York Decision"); Decision on the Applications of BayBank Connecticut, N.A. and BayBank Boston, N.A. (OCC Corporate Decision No. 95-34, July 26, 1995) ("OCC BayBanks/Connecticut Decision"); Decision on the Applications of PNC Bank, New Jersey, N.A. and PNC Bank, N.A. (OCC

issues raised by the objection, we revisited our analysis of pre-Riegle-Neal law and thoroughly considered the impact of the Riegle-Neal Act on existing authority and the applicability of state law.

Therefore, these Applications by Sun World are similar to a number of prior interstate relocation and branching applications approved by the OCC. Indeed, the objections raised to these Applications by the Texas and New Mexico Bank Commissioners are similar to those raised by the Kansas Bank Commissioner in the OCC Bank Midwest Decision. The legal analysis and authorities set forth in the prior decisions, especially the OCC Bank Midwest Decision, the OCC NationsBank/Maryland National Decision, and the OCC First Fidelity/New Jersey Decision, also apply here.

A. Sun World may Relocate its Main Office to Santa Teresa, New Mexico, and Continue to Operate its Existing Branches in El Paso, Texas, under 12 U.S.C. § 30.

In the Relocation Application, Sun World applied to change the location of its main office from El Paso, Texas, to Santa Teresa, New Mexico, a distance of approximately one-half mile. Sun World will keep and continue to operate its two existing branches in El Paso, Texas. Thus, after the relocation, Sun World will be an interstate national bank operating in two

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Corporate Decision No. 95-36, August 7, 1995); Decision on the Applications of Fleet National Bank, Providence, Rhode Island, et al. (OCC Corporate Decision No. 96-17, March 27, 1996) ("OCC Fleet Decision").

states, with its main office in New Mexico and branches in Texas.

1. The Interstate Relocation of Sun World's Main Office to Santa Teresa is Authorized.

The relocation of Sun World's main office is legally authorized under 12 U.S.C. § 30. Section 30 authorizes a national bank to change the location of its main office to any location within 30 miles of the limits of the city in which its main office is located. 12 U.S.C. § 30(b). Such a relocation, even across state lines, is authorized by the literal language of the statute, and nothing in the legislative history gives any reason not to adhere to the literal language. Section 30 operates independently of section 36, and the authority to relocate a main office is not limited by the McFadden Act. Thus, a main office relocation can result in a national bank having an office at a location where it would not be authorized to establish a branch. Finally, section 30 preempts state laws that conflict with the authority it confers on national banks.

The authority of a national bank to relocate its main office is set out in 12 U.S.C. § 30(b), which provides:

> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the

> limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits.

12 U.S.C. 30(b) (emphasis added).

Statutory interpretation begins with the language of the statute itself, which must be interpreted in accordance with its plain meaning. See Lewis v. United States, 445 U.S. 55, 60 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). A fundamental canon of statutory construction is that, when a statute's language is clear and unambiguous, the plain meaning of the statute must be applied. See, e.g., Caminetti v. United States, 242 U.S. 470, 485 (1917); Higgins v. Marshall, 584 F.2d 1035, 1037 (D.C. Cir. 1978), cert. denied, 441 U.S. 931 (1979). See generally 2A Sutherland Statutes and Statutory Construction § 46.01 (5th ed. 1992). The OCC, as the agency charged with administering the statute, is bound no less than courts by this canon of construction. "If the statute is clear and unambiguous, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 (1986) (quoting Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). Moreover, the legislative history of section 30 provides no basis for departing from the plain meaning of the statute. See OCC Bank Midwest Decision (Part II-A-1-b) (review of legislative history of section 30 from enactment in 1886 through 1959 amendment that removed language limiting relocations to places within the same state to

1982 amendment that was the last change prior to the Riegle-Neal Act).

Under the "plain meaning" rule of statutory construction, then, section 30 clearly permits a national bank to relocate its main office to any location within 30 miles. See State of Idaho Department of Finance v. Clarke, 994 F.2d 1441, 1444 (9th Cir. 1993) (interstate relocation); Synovus Financial Corporation v. Board of Governors of the Federal Reserve System, 952 F.2d 426, 428 & n.1, 435 (D.C. Cir. 1991) (interstate relocation); McEnteer v. Clarke, 644 F.Supp. 290, 292 (E.D. Pa. 1986) (interstate relocation). See also Ramapo Bank v. Camp, 425 F.2d 333, 344 (3d Cir.), cert. denied, 400 U.S. 828 (1970) (in-state relocation). The plain language in section 30 authorizes a national bank to relocate its statutory "main office" to "any other location" within thirty miles of the limits of the city in which the main office is currently located. This authorization for relocations within 30 miles contains no limitation or other references to state borders or to state law. The proposed main office location in Santa Teresa, New Mexico, in the Relocation Application is approximately one-half mile from El Paso. Thus, on its face, section 30 authorizes the proposed main office relocation.

The proposed location in Santa Teresa will meet the criteria to be a main office under section 30. Section 30 does not define the term "main office." The term also is not defined elsewhere in the National Bank Act. Nor does the National Bank Act impose any specific requirements or criteria for a national bank's main office. However, examination of the original version of section 30, related statutes, and the historical introduction of the term "main office" reveals its intended meaning. The bank's main office is the office designated as

such in its articles of association -- i.e., the office that is the registered location of the corporation as distinct from its branches -- provided only that it conducts a banking business at such office. There is no requirement in statute or case law that the bank conduct the principal portion, or any required minimum portion, of the bank's business at the "main office" rather than at one of its "branches." Indeed, the volume and nature of business conducted at the location is not an appropriate determinant of a valid main office because those factors can be affected by external events that have no connection to the original designation. For example, changing demographics in the market area and changes in local business patterns may cause business at one site (the main office) to shrink, while business at other sites (branches) increases. This interpretation of "main office" in section 30 is confirmed in judicial decisions, prior OCC practice, and analogy to general corporate law. This issue is set out more fully in the OCC First Fidelity/New Jersey Decision (Part II-A-1, pages 12-17) and the OCC Bank Midwest Decision (Part II-A-1-a, pages 12-15).

An extensive discussion of this issue appears in Ramapo Bank v. Camp, 425 F.2d 333 (3d Cir.), cert. denied, 400 U.S. 828 (1970). In Ramapo Bank, a national bank proposed to relocate its main office to another town (at a location where it could not establish a branch) and to establish a branch at the site of the original main office. The plaintiffs argued that the proposal was a subterfuge to evade the McFadden Act by locating a "main office" where the bank could not locate a "branch." (The McFadden Act issue is discussed below.) In particular, they argued the proposed new main office was not a bona fide main office, but was in economic substance a branch, because the former main office would continue to exist as a

branch and would serve the bulk of the bank's existing customers. 425 F.2d at 340.

The court rejected plaintiffs' arguments and cited with approval the criteria used by the OCC in determining that the relocated main office was bona fide. All these criteria relate to the legal characteristics that differentiate a main office from a branch, not business differences. See Ramapo Bank, 425 F.2d at 341. The court also considered the volume of business that would be transferred to or conducted by the relocated main office, because the plaintiffs argued that the relocated main office would not conduct a sufficient volume of business. The court, however, dismissed this as a factor in reviewing the legal authority for the main office and agreed with the OCC's analysis that factors such as the number of customer accounts, addresses of customers, business volume, or size of the office were not relevant to its status as the main office. See id. at 342.

In the present Relocation Application, just as in Ramapo Bank, Sun World's proposed main office will have the legal characteristics of a main office. The Santa Teresa office will provide a full range of banking services. It will be designated as the main office in Sun World's articles of association. It will be the main office for all legal purposes, including receipt of service of process. It will be the official mailing address for the bank. In addition, the Santa Teresa office also will maintain the principal corporate books and records of the bank such as charter documents, corporate seals, minutes of directors and shareholders meetings, tax returns, and regulatory reports. Thus, the proposed location in Santa Teresa clearly satisfies the legal criteria for a main office. It properly will be Sun World's "main office" under section 30.

It also has been argued in the past that section 30 should not be interpreted so as to allow a bank to obtain, through main office relocation, a configuration of offices that it could not establish as branches under section 36(c). That is, the bank should not be permitted to move its main office to a location at which the bank could not establish a branch from its old main office. In this interpretation, section 30 would not be given full literal effect, but would be understood as impliedly limited by section 36(c). The OCC has rejected this view. See, e.g., OCC Bank Midwest Decision (Part II-A); OCC NationsBank/Maryland National Decision (Part II-A & II-B); OCC First Fidelity/New Jersey Decision (Part II-A & II-B). Before the Riegle-Neal Act, most courts did not follow this approach. Congress' recent action in the Riegle-Neal Act confirmed the OCC's interpretation of section 30 (discussed below in section A-2).[7]

The overwhelming weight of case precedent supports the interpretation that section 30 must be given its literal meaning and that it alone governs main office relocations. Courts repeatedly have held that section 30 operates independently of the McFadden Act and other statutes. See, e.g., Ramapo Bank, 425 F.2d at 340-46 (section 30 independent of McFadden Act

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[7] As discussed further below in section A-2, in the Riegle-Neal Act Congress amended section 30 to limit a national bank's power to keep branches in its former state when it relocates its main office to another state, beginning on June 1, 1997. In so doing, Congress recognized that section 30 authorizes national banks to relocate their main office across a state line and did nothing to change section 30 in that respect.

and state law); Traverse City State Bank v. Empire National Bank, 228 F.Supp. 984, 992 (W.D. Mich. 1964) (section 30 independent of McFadden Act and state law); Bank of Western Oklahoma v. First National Bank of Sayre, No. CIV-95-1930-A (W.D. Okla. July 29, 1996). See also McEnteer, 644 F.Supp. at 292-94 (section 30 independent of state law and Bank Holding Company Act). Cf. Synovus Financial Corporation, 952 F.2d at 434-36 (section 30 independent of Bank Holding Company Act). But see Marion National Bank of Marion v. Van Buren Bank, 418 F.2d 121, 124 (7th Cir. 1969) (using section 36 to limit section 30) (discussed below).[8]

Several courts have considered the interplay between section 30 and section 36(c) with respect to the issue of the location to which the main office could be located if the bank were simultaneously applying to establish a new branch at its former main office location. In Ramapo Bank the United States Court of Appeals for the Third Circuit upheld the OCC's approval of a main office relocation to an adjacent town along with the establishment of a branch at the site of the former main office. Under state law neither the relocation nor the establishment of a branch at the new main office location would

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[8] The district court in Ghiglieri followed Marion National Bank for the general proposition that section 30 must be read in conjunction with section 36, with section 36 limiting section 30, and then applied that proposition to the issue of the relocating bank's authority to keep its existing branches in Arkansas. But the court also found the bank was authorized to relocate the main office itself from Arkansas into Texas. The court's reliance on Marion National Bank was misplaced because Congress has now addressed the relationship of sections 30 and 36 when it amended the sections in the Riegle-Neal Act. The Ghiglieri decision is addressed separately below in section A-2.

have been permissible for a state bank, but a bank originally at the new main office location could establish a branch at the old main office location. Consequently, the issue raised was whether, by operation of the McFadden Act, 12 U.S.C. § 36, state law branching restrictions were applicable to relocations by national banks under section 30. Opposing the relocation, the plaintiff argued the relocation was merely a subterfuge to circumvent state branching restrictions and establish an impermissible branch location in an adjacent community. The plaintiff also argued the doctrine of competitive equality prohibits approval of a relocation that would not be permissible for a state bank.

The Ramapo Bank court rejected both of these arguments. The court upheld the decision of the Comptroller that the relocation was bona fide and not subject to state branching laws. Most importantly, the court refused to incorporate the McFadden Act and state law restrictions into the clear and unambiguous language of section 30:

> We agree with the holding in [Traverse City State Bank] that Section 30 controls with respect to an application for a national bank's main office relocation free of the impact of state banking laws or policy, and that administrative approval of such an application must be sustained if it is not arbitrary, capricious or an abuse of discretion, and it is supported by substantial evidence. It is certainly not within our province to pass upon the wisdom or desirability of Section 30. That Congress has the power to exempt national banks from state regulation is unquestioned. That Congress has done so with regard to the relocation of the main offices of nationally chartered banks is equally certain, both from the lack of

> express language to the contrary in Section 30, and the absence of contrary suggestion in the congressional history of the National Bank Act, or Section 30 in particular.

425 F.2d at 344 (footnotes and citations omitted).

In particular, the Ramapo Bank court specifically considered the argument that there should be a conjunctive reading of sections 30 and 36(c) in an application for a main office relocation when the existing main office would be retained as a branch. 425 F.2d at 344. In a careful analysis directed to the then-recent Marion National Bank case, the court rejected this argument. The two statutes have separate scope and purpose. Their language and legislative history give no evidence that they were intended to be construed together. Judicial precedent relating to the interpretation of section 36 on matters within its scope is inapposite on the question of whether section 36 is meant to limit section 30. 425 F.2d at 344-46. The Ramapo Bank court concluded:

> Thus, we are of the opinion that branching considerations are inapplicable to the main office relocation of a national bank, and that the bona fides of the relocation is governed solely by the statutory provisions of Section 30 of the National Bank Act.

425 F.2d at 345 (footnote omitted).

The Traverse City State Bank court upheld the OCC's approval of a national bank main office relocation that opponents similarly challenged as inconsistent with state branching law. The court, noting that section 30 is self-contained and, unlike the McFadden Act, does not incorporate state law, declared that:

> It was apparently the intent of Congress not to limit the relocation of main offices of national banking associations by reference to state banking laws, since there is no such limitation [in 12 U.S.C. 30].
>
> If we were to hold [that main office relocations are subject to state law], as plaintiffs urge us to do, we would write into Section 30 of the National Banking Act that which Congress decided not to include in the Act. This court thus would be legislating and usurping the power of Congress.

228 F.Supp. at 992 (emphasis in original). Two other district court cases have followed the same analysis and reached the same result as Ramapo Bank and Traverse City State Bank. See First National Bank & Trust Co. v. Smith, No. K75-19 (W.D. Mich. Sept. 28, 1977); Merchants and Miners Bank v. Saxon, No. 1042 (W.D. Mich. July 13, 1966) (discussed in Ramapo Bank, 425 F.2d at 343).

Finally, in a more recent case involving the interstate relocation of a national bank's main office from New Jersey into Pennsylvania, it was argued that section 30 did not authorize the relocation because it would violate state law and the Douglas Amendment of the Bank Holding Company Act. While the case did not involve the McFadden Act, the court followed the earlier cases in construing section 30 as independently governing national bank main office relocation free of any impact of state banking law or policy. McEnteer, 644 F.Supp. at 292-93 (following Ramapo Bank). In reaching its decision, the court applied the plain language of section 30:

> The plain language of the statute allows national banks to relocate "to any other location" within 30 miles of the

> limits of the city, town, or village within which it is currently located. The proposed relocation complies with that requirement, and [the court] will apply the plain language of the statute. There is no ambiguity in the statute.

McEnteer, 644 F.Supp. at 292.

Before the OCC's decisions in early 1994, only one court reached the opposite result and made main office relocations subject to the McFadden Act and state law. Marion National Bank, 418 F.2d at 124.[9] In Marion, in circumstances similar to those in Ramapo Bank and Traverse City State Bank, a national bank applied to relocate its main office to a nearby

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[9] Recently, the Ghiglieri court followed Marion National Bank. The court's reliance on Marion was misplaced because Congress has now addressed the relationship of sections 30 and 36 when it amended the sections in the Riegle-Neal Act. The Ghiglieri decision is addressed separately in section A-2 below. Another earlier case involving a proposed main office relocation application cited Marion. See First National Bank of Southaven v. Camp, 333 F. Supp 682 (N.D. Miss 1971), aff'd without opinion, 467 F.2d 944 (5th Cir. 1972). There, the Comptroller had denied a bank's applications to move its main office to another town and establish a new branch at its former main office location in circumstances similar to the applications in Marion and Ramapo Bank. In FNB Southaven, the district court held the denial was within the administrative discretion granted the Comptroller. See 333 F.Supp. at 686-88. In *dicta*, the court also discussed the conflict between Marion and Ramapo Bank, but determined it need not adopt either interpretation in the circumstances of the case before it, holding only that, within the Comptroller's discretion in administering applications under the national banking laws, the Comptroller may consider the relationship of the two applications and state law factors, even when not required to. Id. at 689-90.

town and to establish a new branch at the location of its former main office. State law would not permit a new branch to be established at the proposed new main office location. The Marion National Bank court conceded that the relocation in itself would be lawful under section 30, but then concluded that because the transaction as a whole meant that a bank ended up with a new facility where it could not establish a branch, the transaction as a whole must therefore fail on McFadden Act grounds. 418 F.2d at 124. As explained above and also discussed in Ramapo Bank, the Marion National Bank court's analysis fails to give effect to the literal language of section 30 and assumes -- without any evidence or support -- that section 36 is both germane to interpreting section 30 and supersedes it. For these reasons, we believe it is unpersuasive.

As far as we have been able to determine, Ghiglieri is the only court that has followed Marion. Indeed, subsequent to the Ghiglieri court's opinion, in another case raising the relationship of sections 30 and 36(c) in a main office relocation, another district court followed Ramapo and rejected Marion. See Bank of Western Oklahoma v. First National Bank of Sayre, No. CIV-95-1930-A (W.D. Okla. July 29, 1996). The issue in Bank of Western Oklahoma was similar to that in Ramapo and Marion. The First National Bank of Sayre applied to relocate its main office from Sayre to Elk City, while keeping an existing branch in Sayre and moving it to the old main office location. Under the applicable branching law, the bank could not establish a branch in Elk City from its main office in Sayre, but it could have the branch in Sayre from the new main office in Elk City. In its recent decision, the court in Bank of Western Oklahoma followed Ramapo and the other courts that have held that section

30 operates independently of the McFadden Act and state law and rejected Marion. See id. slip op. at 6-7.

Finally, as discussed below, in the amendments it made to sections 30 and 36 in the Riegle-Neal Act, Congress has expressly addressed the relationship between section 30 and section 36 in the context of interstate main office relocations. Since Congress now has addressed the manner in which these two statutes act together, and that manner is different from the position in Marion National Bank, there is no reason to follow that case.[10]

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[10] In some prior main office relocation decisions, the OCC distinguished Marion National Bank by emphasizing the business reasons for the relocation. The presence of business reasons was used to support the validity of the relocation despite alleged inconsistency with State law. However, section 30 does not require a showing of business justification for a relocation. See, e.g., Traverse City State Bank, 228 F.Supp. at 990 (showing of necessity not required for main office relocation). Moreover, this analysis may not clearly distinguish Marion. First, the essence of Marion is that the McFadden Act and State law should apply to and limit section 30 in such cases. Second, it is unlikely a bank would propose a main office relocation unless it had good business reasons for doing so. Rather than attempting to distinguish a flawed case, it is preferable to recognize the case was incorrectly decided, especially now that Congress has established the relationship of sections 30 and 36. See also First National Bank & Trust Co. v. Smith, supra (rejecting Marion and following Ramapo); McEnteer, 644 F.Supp. at 292-93 (following Ramapo). In any event, Sun World has amply demonstrated the business reasons for its proposal. In its application, Sun World notes that Santa Teresa is immediately adjacent to El Paso, the area forms one market, and there is rapid economic development in the Santa Teresa area and Dona Ana County. See Memorandum in Support of Application at pages 3-6 and Attachment A. After these transactions, Sun World will be able to expand its business by offering banking services to residents and businesses in Santa Teresa and to better serve its existing customers who live in Santa Teresa and work in El Paso, or vice versa, and business customers who have operations in both

Thus, national banks are authorized to move their main office to any location within 30 miles, even across state lines. Sun World's proposed main office location in Santa Teresa is approximately one-half mile from El Paso. The relocation of its main office is legally authorized.

2. Sun World's Continued Operation of its Two Existing Branches in El Paso is Authorized under Section 30. Congress Re-affirmed this Authority for National Banks in the Statutory Language and Legislative History of the Riegle-Neal Act.

When it relocates its main office to Santa Teresa, New Mexico, Sun World will continue to operate its two existing branches in El Paso, Texas. In four of the OCC's earlier decisions involving the relocation of a national bank's main office across a state line and the continuation of existing branches in the original state, we extensively analyzed the legal authority for the continued operation of existing branches and concluded that continued operation of such existing branches is legally authorized. In two decisions before the Riegle-Neal Act, we considered the meaning and application of sections 30 and 36, as they then existed, and concluded that section 30 conveyed the authority to keep existing branches when the main office relocated. See OCC NationsBank/Maryland National Decision (Part II-B-1); OCC First Fidelity/New Jersey Decision (Part II-B-1).

In two decisions after the Riegle-Neal Act, we considered the changes Congress made to sections 30 and 36.

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places.

With these amendments, enacted by Congress effective September 29, 1994, the statutory language now expressly addresses the retention of branches in an interstate main office relocation. It is the statute as amended that now governs these transactions and on which we rely. Reviewing the statutory language and legislative history, we found Congress had agreed with the OCC's interpretation of section 30, and had taken steps to limit branch retention under section 30 as of June 1, 1997, in conjunction with the implementation of the new interstate branching authority of the Riegle-Neal Act. See OCC Bank Midwest Decision (Parts II-A-2-e & II-D); OCC Fleet Decision (Part II-A-2). Other decisions after the Riegle-Neal Act, including those shortly after enactment, contained a shorter version of the same analysis. See, e.g., OCC decisions cited in note 6. The same analysis applies to the present transaction.

a. Branch retention under section 30 before the Riegle-Neal Act.

When a national bank that has branches relocates its main office under section 30 (whether the relocation is in-state or interstate), the question naturally arises: what is to become of the bank's existing branches? Logically, there are two possibilities: either (1) the branches simply are kept under section 30 and continue as is, or (2) the branches are effectively treated as divested and may be kept only if the bank could establish them as new branches from its new main office location under section 36(c). As a practical matter, this question has significance only in circumstances, such as Sun World's here, in which the bank could not establish its old branches as new branches under section 36(c) from its new main office location. Thus, in practice, this question means the difference between the

bank's keeping its existing branches when it moves its main office or being required to close them.

In 1994, in the interstate main office relocation decisions before the Riegle-Neal Act that involved branches, the OCC examined the statutory language, its legislative history, case law, the overall statutory framework, and its historical development and concluded Congress intended that, when a national bank relocates its main office under section 30, it may continue to operate its existing branches, without regard to section 36 and state law. It is not required to divest existing branches that could not be re-established as new branches by a bank from the new main office location. See OCC NationsBank/Maryland National Decision (Part II-B-1); OCC First Fidelity/New Jersey Decision (Part II-B-1).[11] See also OCC Bank Midwest Decision (Part II-A-2).

As more fully discussed in those decisions, we based this conclusion on a number of considerations, particularly the following. First, the language of neither section 30 nor section 36 (before the Riegle-Neal Act) explicitly addressed what was to happen to existing branches when the main office relocated. Similarly, the legislative history of neither section explicitly addressed the retention of existing lawful branches in a main office relocation. In addition, this issue had not been addressed

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[11] The OCC earlier had reached the same result regarding the retention of existing branches in an in-State main office relocation. See Decision on the Applications of Kentucky National Bank of Marion County and Kentucky National Bank of Pendleton County (July 2, 1991); OCC Letter from Peter Liebesman, Assistant Director, to Martha R. Seger, Commissioner, Michigan Financial Institutions Bureau (May 22, 1981).

in the case law. Ramapo Bank, Traverse City State Bank, and Marion National Bank involved a main office relocation with a simultaneous application to establish a new branch at the former main office location. They did not address the status and retention of existing branches. Thus, this situation required further investigation to determine congressional intent.

Second, section 36 was not the sole and exclusive authority for national bank branches. Instead, as courts had recognized, other statutes can contain branching authority for the specific areas covered by those statutes. See Colorado State Banking Board v. Resolution Trust Corporation, 926 F.2d 931, 946-47 (10th Cir. 1991) (branching provisions of section 1823(k) for emergency thrift acquisitions separate and independent of McFadden Act); Arkansas State Bank Commissioner v. Resolution Trust Corporation, 911 F.2d 161, 173-74 (8th Cir. 1990) (same); State of Texas v. National Bank of Commerce, 290 F.2d 229, 233 (5th Cir.), cert. denied, 368 U.S. 832 (1961) (national bank banking offices on military facilities authorized under 12 U.S.C. 90 without regard to section 36 and state branching restrictions).[12] See also 12 U.S.C. 1823(f)(4)(B) (branches in assisted interstate bank acquisitions). In those cases, the courts rejected the argument that these other statutes must be read in conjunction with section 36, and branches authorized under them only to the extent permissible under section 36. Instead, the courts ruled that the other statutes were independent of section 36. Thus, it was not inconceivable that

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[12] Indeed, under the authority of section 90, a few national banks operated banking facilities on military bases in more than one State, thus having a limited form of interstate branching even before the Riegle-Neal Act.

section 30 also could be such a statute, not for establishing new branches but with respect to retaining existing branches.

Third, in the period before the McFadden Act (i.e., until 1927), there were some national banks with branches (i.e., State banks that had branches and converted into national banks, and successors by merger of such banks). Under the statute that permitted those banks to retain the branches (the predecessor to the current section 36), those branches clearly could be kept if the bank's main office relocated, since the branch statute did not have any geographic limit in it, and so the geographic relationship between the main office and an existing branch location was irrelevant to its permissibility. And so, in the pre-1927 period there was no potential for a "conflict" between retaining existing branches under section 30 and retaining existing branches under the predecessor to section 36. Since the result was the same in either case, it is not surprising that the question of which statute was the source of branch retention authority did not arise then.

Fourth, in 1927, when it enacted the McFadden Act, amending section 36, Congress did not address branch retention in a main office relocation, and so did not evidence intent to change this pre-1927 result or to subject existing branches of a relocating bank to the new section 36. Congress' primary purpose in the McFadden Act was to grant national banks generally the power to establish or acquire new branches, subject to the statute's limits. In various amendments to section 30 and section 36 between 1927 and 1994, Congress similarly has not addressed branch retention in a main office relocation. Moreover, in 12 U.S.C. § 36(b) Congress did address branch retention in other contexts (i.e., conversions and mergers). This shows that, if Congress had wanted to limit or change the

treatment of existing branches, it knew how to do so. However, the addition of geographic limitations to section 36 created the interpretive dilemma now posed: in a main office relocation, are existing branches that were geographically lawful when established simply continued or must they be divested and subjected to a new geographic review based on the new location of the main office.

Fifth, the existing cases on section 30, discussed above, established that section 30 operates independently of section 36. They deal with the locations to which the main office could move and do not directly address the retention of existing branches.[13] (The establishment of a new branch at the old main office location is a different question, addressed below in Part II-B.) Nevertheless, their analysis of the independence of section 30 from section 36 is pertinent. For, if existing branches were not retained under section 30 in a main office relocation but instead were required to be divested and then established anew under section 36 from the new main office location, then section 36 would be indirectly determining the new main office location. Generally, a bank will need to keep its existing branches to continue its banking operations without impairment. If the McFadden Act applies to the ability to keep existing branches, then the locations of existing branches will impose conditions upon where, in reality, the main office can be relocated. This is clearly contrary to the express and

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[13] The cases do not address the issue of retaining the existing branches either because the bank involved did not have an existing branch or because the existing branch was at a location that would be permissible under section 36(c) from either main office location, and so no question was raised.

unconditional language of section 30 and the courts' holding: for section 30 would no longer be independent of the McFadden Act. Since Congress did not condition the exercise of the power to move the main office upon state law or upon the existence or non-existence of branches, there is no basis for implying such a limitation, even indirectly. Cf. Barnett Bank of Marion County, N.A. v. Nelson, No. 94-1837, slip op. at 8, 517 U.S. __, 134 L.Ed.2d 237, 246 (March 26, 1996) (regarding state law and the powers of national banks, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies").

Finally, we noted that Congress originally enacted section 30, and had subsequently amended it and section 36 several times, without expressly requiring the divestiture, re-examination, or re-authorization of existing branches in a main office relocation. The existing branches of a bank that is relocating its main office were lawful when established. If the bank had to divest all branches that could not be newly re-established from the new main office, then a bank would be penalized for exercising a right granted under the National Bank Act, the right to relocate its main office. We did not believe that such a requirement to surrender existing branching rights, branch buildings, and established customer relationships could be inferred from Congress' silence, since even statutes that expressly affect established property or contract rights are strictly construed. Thus, in the absence of express congressional action requiring that existing lawfully established branches be re-subjected to a de novo analysis under section 36 and divested, we concluded that the intention of the statutory scheme,

considered as a whole, was that existing branches were continued under section 30.

b. Section 30 and the Riegle-Neal Act.

In the Riegle-Neal Act, Congress made this understanding explicit in its amendments of sections 30 and 36. In the language of section 30, effective September 29, 1994, it is clear that national banks are authorized to keep their existing branches when they relocate their main offices. In revisions to section 30, Congress placed a new limitation on this authority in section 30 with respect to certain branches (namely, in an interstate relocation, those branches in the state from which the main office was relocating), but this limitation applies only to transactions occurring after May 31, 1997. In enacting the limitation, Congress recognized that existing branches were retained in main office relocations under section 30 and confirmed that this authority continues for branches not covered by the limitation. And, until June 1, 1997, when the new limitation begins to apply, even branches in the state of the former main office may be retained under section 30. The OCC has so interpreted the Riegle-Neal Act since its adoption. See OCC Bank Midwest Decision (Parts II-A-2-e & II-D); other OCC decisions cited in note 6.

From the OCC's prior approvals and other applications pending at the time the Riegle-Neal Act was under consideration, Congress was aware that the power to retain existing branches in a main office relocation meant that an interstate national bank could occur under that authority. In developing the Riegle-Neal Act, the issue naturally arose whether that authority should be continued or curtailed in light of the new interstate branching authorities being created in the Act. Congress adopted a

compromise. Language was added to section 30 to limit branch retention in an interstate main office relocation, but only for transactions occurring after May 31, 1997. This means not only that the limits added in the new subsection 30(c) do not apply to transactions before June 1, 1997, but also that no limits existed prior to the enactment of section 30(c). Otherwise, Congress would not have found it necessary to deal with the issue.

In the Riegle-Neal Act, Congress added a new subsection (c) to section 30:

> (c) Coordination with Revised Statutes. -- In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in section 5155(e)(2) of the Revised Statutes [12 U.S.C. § 36(e)(2)].

Riegle-Neal Act § 102(b)(2) (adding subsection (c) to section 30). Congress also added the corresponding new subsection to the Revised Statutes:

> (2) Retention of Branches. -- In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State (as defined in subsection (g)(3)(B) [i.e., the State of its former main office]) before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in paragraph (1), to acquire, establish, or commence to operate a branch in such State if --
>
> (A) the bank had no branches in such State;or

(B) the branch resulted from --

(i) an interstate merger transaction approved pursuant to section 44 of the Federal Deposit Insurance Act; or

(ii) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 13(c) of such Act.

Riegle-Neal Act § 102(b)(1)(B) (adding subsection (e)(2) to section 36).

These provisions are intended to place a new limitation on a relocating national bank's authority to keep branches in the State of its former main office. Henceforward, from June 1, 1997, a relocating national bank will be able to keep such branches only in accordance with the branching rules in new section 36(e)(2). The legislative history of these changes is especially illuminating. The Conference Report expressly shows that Congress was aware of existing authority and of OCC analyses and approvals under that authority (such as the OCC NationsBank/Maryland National Decision, the OCC First Fidelity/New Jersey Decision, and the other decisions cited in notes 4 & 5 above) and expected it to continue until June 1, 1997:

> The Comptroller of the Currency (OCC) has used the 30 mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices. Section 102(b)(2) amends the

> provision so that after June 1, 1997, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State. However, along with the OCC's approval for the relocation, the bank would be required to obtain the Comptroller's approval under section 5155 of the Revised Statutes [12 U.S.C. § 36] to continue to operate any remaining branch offices located in State other than the State of its new main office. Thus, the bank would be required to file a consolidated application with the OCC covering both aspects of the transaction; the OCC would be authorized to act on the remaining out-of-State branch aspect of the transaction only pursuant to section 5155. State banks are treated in a similar manner.
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> The Conferees are aware of the OCC procedures in permitting relocation across state lines. The Conferees concur with those procedures, including the application of appropriate State law and authority. The Conferees expect the OCC to continue to follow those procedures until the provisi ns of Title I become fully applicable on June 1, 1997.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (August 2, 1994) (Report on H.R. 3841, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994) (emphasis added).

From the new statutory language and its legislative history, it is clear Congress understood that under existing law a national bank can move its main office across state lines while keeping branches in its former state and that this existing law is being changed by the amendment. While the new subsections 30(c) and 36(e)(2) directly apply only to transactions occurring

after May 31, 1997, their addition to the statute is revelatory of existing section 30. If the antecedent power to retain branches was not present in existing law, there would be no need to impose the limitation. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. ___, 130 L.Ed.2d 740, 748 (1995) (interpreting 12 U.S.C. § 24(7); "Congress' insertion of the limitation decades after the Act's initial adoption makes sense only if banks already had authority [under the Act]"). This limitation on section 30, which begins on June 1, 1997, would have been unnecessary if other statutory provisions already required a national bank to divest existing branches that could not have been reestablished as branches under section 36(c) following a main office relocation under section 30. Moreover, if Congress did not believe such authority existed, it would hardly have imposed the limitation to begin only on June 1, 1997, rather than immediately. In addition, the limitation is imposed only on the ability to keep certain branches: those in the state of the former main office. In other situations, such as an in-state relocation, Congress did not change the branch retention authority of section 30.

Thus, from the amended statutory language and its legislative history, it is clear Congress understood: (1) that a national bank that relocates its main office keeps its existing branches under section 30, (2) that under existing law a national bank can move its main office across state lines while keeping branches in its former state, and (3) that this existing law is being changed and limited only by the express congressional action in the amendments. In the Riegle-Neal Act, Congress changed the power of a relocating national bank to retain branches in the state of its former main office. But that change

applies only to transactions occurring after May 31, 1997. Branch retention continues unchanged until then.

Moreover, this new statutory language and its legislative history must be viewed in the context of its adoption. In January and February 1994, the OCC had issued two decisions approving interstate main office relocation transactions in which the OCC set out its statutory interpretation that section 30 governs main office relocations, including retaining existing branches, without regard to the McFadden Act. Those decisions were well-known to Congress.[14] When Congress revisits a statute that has an established administrative or judicial interpretation without pertinent change, "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 846 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974). See also Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979) ("[O]ur evaluation of congressional action in 1972 must take into account its contemporary legal context."); Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, [citations omitted]."); Laufman v. Oakley Bldg. & Loan Co.,

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[14] The two interstate main office relocation decisions to which Congress alluded in the Conference Report (the OCC First Fidelity/New Jersey Decision and OCC NationsBank/Maryland National Decision) had also compiled previous OCC and judicial positions on the subject, including the other OCC decisions cited in notes 4 & 5 above.

408 F. Supp. 489, 496 (S.D. Ohio 1976) ("[W]here prior agency interpretations have not been overturned during subsequent congressional reenactment or amendments, these interpretations take on added importance."). This doctrine has even greater force where, as here, Congress explicitly acknowledged the OCC's interpretation, stated it agreed with the OCC's interpretation, and then changed the statute only in one specific way (and then only for transactions occurring after May 31, 1997). It must be conclusively presumed that Congress intended the statutes to have the meaning as the OCC had interpreted them. Whatever uncertainty may have existed in the statutes on this point before, the Riegle-Neal Act has now clearly established that this was the law.

Finally, in addition to confirming and preserving the section 30 main office relocation authority, Congress also kept that authority separate from the new interstate authorities created in the Riegle-Neal Act, at least until June 1, 1997. In the Riegle-Neal Act Congress authorized interstate branching by national banks through interstate merger transactions (new section 44 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831u) and through de novo interstate branches (new subsection (g) to Revised Statutes 5155, 12 U.S.C. § 36(g)). The interstate merger authority is automatically effective June 1, 1997, but states may "opt-in" early. See 12 U.S.C. § 1831u(a)(3). In addition, states may "opt-out" of the interstate merger provisions by enacting a law to that effect before June 1, 1997. See 12 U.S.C. § 1831u(a)(2). The interstate de novo branching authority is effective if the state where the branch would be has a law that triggers the federal authority. See 12 U.S.C. § 36(g)(1). But Congress addressed interstate branch retention in section 30 relocations in separate provisions of the

Riegle-Neal Act (new 12 U.S.C. § § 30(c) & 36(e)(2)) that do not depend on either of the new authorities. The only connection created by Congress between section 30 and the new Riegle-Neal authorities is that section 36(e)(2)'s new limitation on interstate branch retention under section 30 (which applies to transactions occurring after May 31, 1997) continues to permit branch retention if the relocated bank would be authorized to acquire a branch in the former state of its main office if the branch resulted from an interstate merger transaction under the Riegle-Neal Act's new provision, 12 U.S.C. 1831u. Moreover, while Congress has granted the states authority in determining whether to participate in the new interstate authorities created in the Riegle-Neal Act, Congress did not include any similar grant of state authority in the portions of the Riegle-Neal Act that deal with the pre-existing section 30 authority. And, since Congress kept the section 30 authority separate, a State's action in opting-in to, or opting-out of, the Riegle-Neal authorities has no bearing on the section 30 authority, at least until June 1, 1997.[15] Thus, in Sun World's Relocation Application, the fact that Texas may have adopted legislation with the intent of opting-out of the interstate merger provisions of the Riegle-Neal Act and of not opting-into the interstate de novo branching provisions, see note 30 below, does not affect the bank's power to retain its existing branches in its main office relocation under section 30. The relationship between section 30 and the

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[15] After May 31, 1997, if a State has opted out of interstate merger transactions under 12 U.S.C. § 1831U(A)(2), then the power of a bank relocating its main office out of that State to retain branches in that State under section 30 is curtailed by 12 U.S.C. §§ 30(c) & 36(e)(2).

Riegle-Neal Act is addressed further below in connection with the Texas Bank Commissioner's objections.

Unfortunately, the district court in Ghiglieri mischaracterized the recent amendments to sections 30 and 36. The court mistakenly asserted that the Riegle-Neal Act provisions were not yet in effect and so did not need to be addressed. But in fact, while some parts of the interstate merger and branching provisions in the Riegle-Neal Act (including the amendments to sections 30 and 36) have a date within them (June 1, 1997), when certain standards change, the effective date of the provisions was September 29, 1994, the date of enactment of the Riegle-Neal Act.[16] By ignoring the amendments, the court did not construe and apply the statutes as they existed at the time of the OCC's decision, but as they existed before the Riegle-Neal Act. Indeed, by doing so, the court acted as if it were reviewing the OCC's initial adoption of this statutory interpretation in early 1994, instead of reviewing an agency interpretation that has seen subsequent and intervening congressional action. The goal of statutory construction by agencies and courts, and of judicial review of agencies' construction, is to ascertain the intent of Congress. Where Congress has shown its intent in subsequent amendments of the

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[16] Similarly, the core provision of the Riegle-Neal Act -- namely, the new section 44 added to the Federal Deposit Insurance Act that authorizes interstate merger transactions -- has the June 1, 1997, date within it. On and after that date, interstate merger transactions are authorized unless a State has opted out. But before that date, interstate merger transactions are also authorized, if the States involved have opted-in. Like the amendments to sections 30 and 36, the new section 44 was effective on September 29, 1994, and has a date within it, making a different rule for transactions before that date and after that date.

statute that agree with an agency's interpretation and change the statute to change the agency's interpretation in only one respect, that should be the end of the matter. While the statutes' intended meaning may have been unclear when the OCC initially interpreted them in January 1994, Congress has since addressed the issue, amending the statutes and affirming the OCC's interpretation, in September 1994. In Ghiglieri, the district court mistakenly failed to recognize that the section under which the OCC took its action and the relevant legislative history for that section were addressed by Congress in 1994.[17]

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[17] Although the district court stated the provisions added in the Riegle-Neal Act do not take effect until June of 1997, some might attempt to defend the decision by arguing that, while the provision was effective on September 29, 1994, it does not convey any branch retention authority until June 1, 1997. This would be an argument about the meaning and intent of the current statute. In this interpretation, there was no branch retention authority under section 30 before, and Congress was adding a new power in the amendments to section 30. As discussed further below at pages 28-31, this strained interpretation is mistaken for several reasons. It ignores the significance of the term "only" in new subsection 30(c) (after May 31, 1997, the relocating bank may retain branches in its former state "only to the extent authorized" in section 36(e)(2). The use of this term signifies a limitation, not a new grant of power. This view also ignores the legislative history and contemporaneous context.

Moreover, even if the court had been reviewing an OCCdecision from before the Riegle-Neal Act's amendments to sections 30 and 36, or if the post-Riegle-Neal statutes could be characterized as ambiguous, the district court clearly erred in not deferring to the OCC. See Smiley v. Citibank (South Dakota), N.A., No. 95-860, slip op. at 3, __ U.S. __ (June 3, 1996) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of the rule of deference with respect to his deliberative conclusions as to the meaning of these laws."), quoting NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 513 U.S. __, 130 L.Ed.2d 740, 747 (1995). See generally Chevron U.S.A. Inc. v. Natural

Accordingly, when it relocates its main office from El Paso to Santa Teresa, New Mexico, Sun World is legally authorized to continue to operate its existing branches in El Paso.

c. The Texas Bank Commissioner's objections to branch retention under section 30 and the Riegle-Neal Act.

The Texas Bank Commissioner objected to the Relocation Application, because of the continued operation of branches in Texas, disagreeing with the OCC's analysis and conclusions under section 30 and the Riegle-Neal Act. The New Mexico Bank Commissioner and the Independent Bankers Association of Texas ("IBAT") made similar objections. The Texas Commissioner also referred to the district court opinion in Ghiglieri as part of her objection. In the following discussion, we refer to the issues raised in common in all these sources as the Commissioner's objections. Matters raised by only one objector are addressed individually.

The Commissioner claims that, contrary to the OCC's position, there is no authority for a national bank to keep its existing branches when it relocates its main office across a state line under section 30.[18] The Commissioner's arguments for her

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Resources Defense Council, Inc., 467 U.S. 837 (1984).

[18] While the Texas and New Mexico Bank Commissioners contend there is no authority to retain existing branches in a main office relocation under section 30 in general, IBAT appears to concede that the power may exist until June 1, 1997, but claims it does not apply here because Texas enacted legislation

position can be summarized in the following three points: First, there is no authority to retain existing branches under section 30 because national banks' branches are governed exclusively by section 36 (the McFadden Act). The proposed retention of Texas branches is not permitted by the McFadden Act because a bank from New Mexico cannot open branches in Texas. Second, Congress' action with respect to branch retention under section 30 in the Riegle-Neal Act permits branch retention only in transactions in which the branches would be in conformance with the McFadden Act and state law. Third, any broader authority for branch retention in an interstate main office relocation would violate the Riegle-Neal Act because it would permit national banks to have interstate branches by a method other than the two methods provided in the Riegle-Neal Act. The new interstate branching provisions created in the Riegle-Neal Act are intended to be the exclusive means to have a branch in a new state, and so section 30 cannot be an alternate way of having interstate branches. The issues raised by the Commissioner are similar to those raised over a year ago by the Commissioner and other state commissioners concerning other relocation applications. See, e.g., OCC Bank Midwest Decision

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prohibiting interstate branches. Our discussion in this section in general addresses the broader objection. With respect to the narrower objection, we explain why Texas' putative action relative to Riegle-Neal mergers and Riegle-Neal de novo branches has no bearing on the continuation of the relocation authority under the Riegle-Neal Act at page 19 above and pages 30-32 and 39 below. In fact, IBAT's claim would make the limits on branch retention in section 36(e)(2) (which include a reference to the availability of a Riegle-Neal merger to the relocating bank apply to transactions now, before June 1, 1997. But the statute clearly makes the limits apply only to transactions after May 31, 1997.

(Part II-D) (Kansas Bank Commissioner); OCC Commercial National Bank Decision (Texas Bank Commissioner). We will address these points in turn.

i. Even before the Riegle-Neal Act, section 36 did not govern all aspects of national bank branches and, in particular, did not limit the retention of existing branches after a main office relocation.

The Commissioner's first argument is that section 36 is the exclusive source of branching authority for national banks and there is no authority to retain existing branches under section 30, unless the branches would have been permitted as branches under section 36. This is the Commissioner's principal argument. But, in making it, the Commissioner presents the arguments that section 36 should apply to, and limit, branch retention in a main office relocation as those arguments would have been presented in the past, as if Congress did not address and settle this question in 1994. Today, after the Riegle-Neal Act, there are more current and more probative manifestations of congressional intent: the amendments to the sections, the legislative history, and congressional action after the OCC's interpretation. The Commissioner disagrees with the OCC's interpretation and presents now the arguments that could have been raised against that interpretation in early 1994. But it is the OCC's interpretation of sections 30 and 36 that Congress had before it when it amended those sections in the Riegle-Neal Act.

Even though these pre-Riegle-Neal arguments about the meaning of sections 30 and 36 have been overtaken by later developments, they are the main focus of the Commissioner and

the Ghiglieri court. Accordingly, we address them, particularly to place the Riegle-Neal amendments in context and to show again that the OCC's pre-Riegle-Neal statutory interpretation (summarized at pages 14-16 above) was reasonable.

The Commissioner asserts that allowing a bank to keep existing branches in its original state when it relocates its main office violates the limitations on branching set forth in the McFadden Act, 12 U.S.C. 36. According to the Commissioner, section 30 was never intended to provide the means for national banks to branch, and so it cannot be used to result in an interstate branch network. The Commissioner and the Ghiglieri court also note that section 30 does not expressly address branch retention and that section 36 addresses branch retention in other circumstances (i.e., grandfathered branches, conversions, and consolidations), but not in main office relocations. (This was true of sections 30 and 36 before the Riegle-Neal Act, but now, pace the Ghiglieri court, sections 30(c) and 36(e)(2) do expressly address branch retention in an interstate main office relocation.) The Commissioner claims that when it enacted the McFadden Act in 1927, Congress made it the exclusive authority by which national banks could establish branches thereafter, and that it provided for establishing branches only within their home states. Moreover, in section 36 Congress made national banks' authority to establish branches depend upon state law permitting branches for state banks. Prior to the McFadden Act, in 1924 the Supreme Court held that national banks did not have an implied general power to branch, see First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924), and so national banks could establish branches only under a specific statutory authorization. Thus, the Commissioner argues, unless a branch is authorized under the

McFadden Act, it is not permissible for a national bank, and since a national bank in New Mexico could not establish a branch in Texas under the McFadden Act, Sun World cannot keep its branches in Texas when it relocates its main office.

However, the Commissioner's argument here mischaracterizes the OCC's position. The OCC does not claim that section 30 is an authority for national banks to establish branches. Rather, the issue in the OCC's section 30 decisions is whether pre-existing already lawfully established branches must be treated as if they were divested when the main office relocates and the ability of the bank to have branches at those locations tested as if the bank had never been located there before. The branches themselves were each established (at the earlier time when they were established) under the applicable provisions of the McFadden Act or other law. Then, later when the bank applies to relocate its main office, the question arises whether the bank may keep its existing branches or, as part of relocating its main office, it must give up its existing branches and have the relocated bank re-establish them anew. In the analysis in the relocation decisions, we concluded that the existing branches did not have to be effectively divested and reestablished, but that any subsequent new branches, including a branch at the former location of the main office, would have to be established under section 36 by the relocated bank. See, e.g., OCC First Fidelity/New Jersey Decision (Part II-B-1); OCC Bank Midwest Decision (Part II-A-2). Since this is an issue of the authority to retain existing lawfully established branches, not the authority to establish new branches, the fact that the McFadden Act might once have been the exclusive means to establish new branches (even assuming that proposition to be true) and the holding in First National Bank in St. Louis that

national banks had no implied general power to establish branches are simply not germane. And, of course, Congress' action in amending sections 30 and 36 confirmed the OCC's earlier interpretation.

Indeed, the Commissioner's mischaracterization obscures the real issue and presents the question backwards. The relocating bank already has its existing branches; thus, the proper question is whether there is any legal requirement to divest them when the main office relocates. The Commissioner tries to turn the question into whether there is any authority for the relocating bank to establish branches under section 36 at the existing branch locations. This presupposes that, in a main office relocation, an additional, separate grant of authority to continue existing operations at branches is needed, and in the absence of such authority, the branches must be re-evaluated as new branches under section 36. The Commissioner offers no support for the unusual proposition that when a national bank does one thing under a statutory authority, its existing other operations and powers must be affirmatively preserved in the statute or they are lost. In fact, if the Commissioner's theory were applied consistently, it would mean that in every main office relocation (including those in which the location of the branches was not an issue), all existing branches would be considered divested and the bank would have to apply to re-establish them under section 36(c). In many years of administering main office relocations under section 30, the OCC

has not required new branch applications for existing branches.[19]

Moreover, the Commissioner's assertion that the McFadden Act is the exclusive source of branch authority for national banks is simply incorrect. Before the Riegle-Neal Act, courts recognized that other statutes, in addition to the McFadden Act, can contain additional branching authority in special circumstances. See Colorado State Banking Board v. Resolution Trust Corporation, 926 F.2d at 946-47 (branching provisions of section 1823(k) for emergency thrift acquisitions separate and independent of McFadden Act); Arkansas State Bank Commissioner v. Resolution Trust Corporation, 911 F.2d at 173-74 (same); State of Texas v. National Bank of Commerce, 290 F.2d at 233 (banking offices on military facilities under section 90 independent of section 36 and state law).[20] See also 12 U.S.C. § 1823(f)(4)(B) (branches in

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[19] If the relocating bank proposes to establish a new branch at the former location of its main office, the OCC does require a separate application for that new branch. See 12 C.F.R. § 5.40(d)(4). But this requirement applies only to the new branch at the former main office location; it does not apply to retaining existing branches. The Commissioner's and IBAT's reference to section 5.40(d)(4) in connection with the retention of existing branches is mistaken.

[20] Indeed, the argument made by the Commissioner now against retaining existing branches under section 30 is similar to that made by her predecessor Texas bank commissioner in objecting to the banking facilities under section 90 in Texas v. National Bank of Commerce. There, Texas argued that section 36 was the exclusive branching authority, and in particular that section 90 was not independent of section 36, but only allowed banking facilities to be established to the extent allowed by State branching law as incorporated into section 36:

assisted interstate bank acquisitions). Before the Riegle-Neal Act, the McFadden Act did not specifically prohibit other sources of branching. This leaves open the possibility that branching may be authorized under other statutes. The OCC concluded section 30 was such an authority, but only to the extent of keeping existing branches in a main office relocation, not establishing new ones. In the Riegle-Neal Act, Congress added an exclusivity provision to the McFadden Act (new

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> The State of Texas thus bases its position on the pari materia argument that the provisions of § 90 go only so far as is permitted by § 36, i.e., that banking facilities authorized by § 90 may, under § 36, be opened only where State law permits them. The appellants and the government, on the other hand, urge that § 90 is not in any way limited to §36.

290 F.2d at 233. The Fifth Circuit rejected Texas' position and found section 90 was independent and superseded section 36 and Texas branching law. Similar to Texas then, the Texas Bank Commissioner now argues that section 30 is not independent of section 36 and does not permit a national bank to retain existing branches at locations where it could not establish them anew under section 36. The OCC believes section 30 is independent of section 36 (and remains independent until the statutory changes linking the sections on June 1, 1997). The Commissioner believes that section 30 must be construed in pari materia with section 36. Prior to the changes in the Riegle-Neal Act that settled the issue, the courts were divided on this question whether section 30 was independent or must be construed in pari materia with section 36. Compare Ramapo Bank, 425 F.2d at 344-46 (section 30 independent of section 36 and State law); McEnteer, 644 F.Supp. at 292 (same); Traverse City State Bank, 228 F.Supp. at 992 (same) with Marion National Bank, 418 F.2d at 124 (section 30 limited by section 36). By the changes adopted in the Riegle-Neal Act (new sections 30(c) and 36(e)(2)), Congress has made it clear that, after May 31, 1997, branch retention under section 30 is limited by section 36(e)(2), for the main office relocations that come within section 36(e)(2), and remains independent with respect to others.

subsection 12 U.S.C. § 36(e)(2)) that will, when it is effective, end the authority to retain branches in the state from which the main office is relocating, unless permitted under the provisions of section 36(e)(2). But until that date, the branch retention authority of section 30 continues without limitation.

In addition, the Commissioner's and the Ghiglieri court's claim that the relocation of the main office and retention of existing branches "violates the McFadden Act" relies on a conjunctive reading of sections 30 and 36 -- i.e., the belief that section 36 limits section 30. This position ignores the precedent of the Fifth Circuit in Texas v. National Bank of Commerce and the specific holdings in Ramapo Bank, Traverse City State Bank, and other cases discussed above that section 30 is independent and separate from section 36. Indeed, Ghiglieri is the only court that has followed Marion National Bank. And, subsequent to Ghiglieri, in Bank of Western Oklahoma, another district court again followed Ramapo Bank and the other cases, rejecting Marion National Bank and the supposed conjunctive reading of sections 30 and 36. See discussion at page 12 above. The position that sections 30 and 36 must be read in conjunction thus relies solely on Marion National Bank. But the reliance on Marion National Bank is especially misplaced today, after the Riegle-Neal Act. The old disagreement in the case law whether section 30 is independent or must be read in conjunction with section 36 has been settled by Congress. Section 30 and section 36 are indeed conjunctive today because Congress changed them in the Riegle-Neal Act to make it so by adding the new subsections 12 U.S.C. 30(c) and 36(e)(2), as discussed above. Congress limited branch retention under section 30 by reference to section 36 in a very specific way for certain existing branches in an interstate relocation, left other branch retention

independent, and made the new limit apply only to transactions occurring after May 31, 1997. Since Congress has acted on the question, it is no longer open for the courts to rely on Marion National Bank to read other limits from section 36 into section 30.

The Commissioner's McFadden Act argument also relies on the doctrine of "competitive equality" -- i.e., the principle that in general in section 36(c) Congress intended to insure competitive equality between state banks and national banks with respect to branches. See First National Bank in Plant City v. Dickinson, 396 U.S. 122, 133-34 (1969); First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 261 (1966). The Commissioner asserts it would violate the doctrine of competitive equality for a national bank to have a configuration of offices as a result of a main office relocation if a state bank could not have a similar configuration. The same argument was made Ramapo Bank. While Ramapo Bank did not involve the retention of existing branches, it did involve applications by a national bank that would give it a configuration of offices that a state bank could not have. The court strongly rejected the competitive equality argument in the context of section 30. Section 30 is a separate statute that by its terms and history has no reference to state law or "competitive equality" with state banks for matters within its scope. 425 F.2d at 345-46. "Competitive equality" is a consideration in construing aspects of section 36(c). Thus, it and other doctrines in branching cases are inapposite in determining the applicability of section 30. 425 F.2d at 345. In essence, the Commissioner's reliance on "competitive equality" begs the question. The question is whether section 30 or section 36 applies (i.e., does section 30 authorize the retention of branches or must they be subjected to

section 36(c)). Competitive equality is a section 36 doctrine, and its use presupposes that section 36(c), rather than section 30, is applicable. But that is precisely the point at issue.

Moreover, even as a section 36(c) matter, the so-called "competitive equality" doctrine is not all encompassing. First, as a general matter, while the McFadden Act makes national banks' branching powers generally similar to state banks, it does not make them identical. It does not simply state that national banks may branch to the same extent as state banks. It incorporates state law and makes it applicable to national banks, but it -- as a matter of federal law -- also determines what state law is incorporated and in what manner. And more generally, definitional questions under section 36 (such as "branch," "state bank" or "situated") are determined as a matter of federal law. See, e.g., First National Bank of Plant City v. Dickinson, 396 U.S. 122, 133-34 (1969) ("branch"); Department of Banking & Consumer Finance v. Clarke, 809 F.2d 266, 269-70 & n.1 (5th Cir.), cert. denied, 483 U.S. 1010 (1987) ("state bank"); Independent Bankers Association of New York v. Marine Midland Bank, 757 F.2d 453, 459 (2d Cir. 1985) ("establish and operate" and "branch"); Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48, 51 (9th Cir.), cert. denied, 419 U.S. 844 (1974) ("situated"). This complex relationship between federal law and state law in the McFadden Act sometimes means national banks have different branching powers than the state permits its state banks.

Second, in particular, the competitive equality doctrine had no bearing on interstate branches before the Riegle-Neal Act. Section 36(c) addresses and authorizes only the establishment of new branches by a national bank within the state in which it is situated, and incorporates the state's law for

branching by its own state banks. Since it addresses only branching within the state, it does not include any state law that might permit its state banks to have branches in another state, or forbid them from having branches in another state. Similarly, it does not include state laws permitting banks from other states to establish in the state, or prohibiting them from doing so. Unlike the former Douglas Amendment to the Bank Holding Company Act, the McFadden Act (before the Riegle-Neal Act) contains no trace of Congress' permitting the states to govern interstate operations. Thus, under section 36(c), the only state law relevant for a national bank is the state's branching law for branching within that state by that state's banks. Since the only state law referred to in section 36(c) is the law for in-state branching, "competitive equality" cannot be an issue for interstate branches.[21]

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[21] Indeed, in practice before the Riegle-Neal Act, there was never "competitive equality" between State banks and national banks with respect to interstate branches. States could permit State banks to have interstate branches, and State nonmember banks would be authorized to establish them. But national banks could not have taken advantage of that authority because section 36(c) permits national banks to establish new branches only within the State where the bank is situated. Before the Riegle-Neal Act, at least seven States had laws permitting interstate branching. See Interstate Banking, Banking Policy Report (volume 13, No. 3) at 12 (February 7, 1994) (survey of State laws on interstate banking and interstate branching). Here, if Texas and New Mexico had adopted such laws, State banks could have established interstate branches between those States. Thus, the McFadden Act, before the Riegle-Neal Act, did not contemplate "competitive equality" in interstate branching. While interstate branch retention under section 30 may provide an advantage to some national banks, the States also had, and continue to have until May 31, 1997, the power to grant far greater interstate branching rights to their own State banks that national banks could not easily match. After May 31, 1997, because of the Riegle-Neal Act's exclusive

Thus, careful consideration of all relevant factors reinforces the OCC's original interpretation of sections 30 and 36 before the Riegle-Neal Act. When a national bank relocates its main office, the bank is not required to divest its existing branches. The existing branches continue without re-evaluation under section 36. Section 30, including the retention of existing branches, is independent of section 36.

ii. Congressional action on sections 30 and 36 in the Riegle-Neal Act clearly shows that existing branches are retained in a main office relocation, and Congress acted to change that power for transactions after May 31, 1997.

Second, the Commissioner disagrees with the OCC's interpretation of the significance of Congress' addition of sections 30(c) and 36(e)(2) in the Riegle-Neal Act. As discussed above, the OCC's view is that these provisions quite plainly impose a new limitation on a national bank's power to keep branches in its original state under section 30 when it relocates its main office from one state to another, and make the new limitation apply to transactions occurring after May 31, 1997. With the new limitation, branches in the original state may be retained (1) if the bank could establish or acquire a branch in the original state under section 36 or other specified sections if the bank had no branches in that state, or (2) if the bank could

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interstate branching provisions for both State banks and national banks (12 U.S.C. §§ 36(e) & 1828(d)(3), discussed below), the authority to enter new States with interstate branches will be the same for national banks and State banks.

establish or acquire a branch in the original state if the branch had resulted from a Riegle-Neal interstate merger or resulted from an assisted transaction. This express limitation on branch retention following an interstate main office relocation clearly reflects Congress' understanding that national banks could generally retain their existing branches after they relocate their main office. The fact of imposing a limitation presupposes the branch retention authority pre-existed. If such branch retention were already subject to limitations based on section 36, as the Commissioner and the Ghiglieri court assert, there would be no need to enact a new subsection adding a limitation based on section 36. The imposition of the limitation makes sense only if banks had the power before and Congress now wanted to limit it to conform it to the new Riegle-Neal framework.

The Commissioner's reading of sections 30(c) and 36(e)(2) is markedly different. According to the Commissioner, before the Riegle-Neal Act, a national bank relocating its main office from one state to another can retain branches in the first state only if the branches are authorized under section 36 and state law. The Riegle-Neal Act did not change this. The provisions in sections 30(c) and 36(e)(2) merely continue that existing limitation on branch retention and add a reference to the wider range of such state-permitted branching available under the Riegle-Neal Act. According to the Commissioner, there is no branch retention authority under section 30, and the congressional action on sections 30 and 36 in the Riegle-Neal Act is not indicative of congressional intention regarding branch retention under section 30.

However, the Commissioner's interpretation of sections 30(c) and 36(e)(2) and the legislative history has the effect of making the sections mostly pointless. Under the

Commissioner's theory, before the Riegle-Neal Act, the only instances in which branches could be kept in a main office relocation are those in which the bank would be authorized to maintain the branches under the McFadden Act and state law. Then, as the Riegle-Neal Act expanded the authority for interstate branches, more interstate branches would be authorized under the McFadden Act (section 36 as amended by Riegle-Neal). For the Commissioner, there is no additional branch retention authority under section 30. But after the Riegle-Neal Act (i.e., after the June 1, 1997, date in section 36(e)(2)), the retention of branches in the narrow circumstances accepted by the Commissioner continues to be permitted, since section 36(e)(2) includes "this section" (i.e., Revised Statutes § 5155, the McFadden Act) and the Riegle-Neal Act's interstate merger provisions as continuing sources of authority. Under the Commissioner's theory of sections 30(c) and 36(e)(2), everything that was properly permitted before sections 30(c) and 36(e)(2) were added continues to be permitted after. Thus, the Commissioner's theory renders the major part of sections 30(c) and 36(e)(2) redundant. It also ignores the legislative history that the scope of branch retention under section 30 in interstate relocations will change on June 1, 1997.[22]

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[22] In this interpretation of sections 30(c) and 3[6](e)(2), the only change from prior law apparently would be the addition of a new power, after May 31, 1997, to retain branches in the original State in an interstate main office relocation if the bank could have engaged in a Riegle-Neal interstate merger under 12 U.S.C. §1831u between the two States involved. If the only change Congress was making to branch retention in interstate main office relocations was adding this new power, the statutory language used -- replete with terms and connotations of limitation -- is puzzling. In the OCC's interpretation of these sections, the reference to the Riegle-Neal Act merger provision is not the grant of a new

Moreover, the Commissioner's notion of the proper extent of permitted branch retention is inconsistent even with section 36. In the Commissioner's theory, a national bank relocating its main office from state A into state B may retain existing branches in state A only if it is permitted by section 36, which the Commissioner believes equates with being permitted by state A -- i.e., if state A permits banks from state B to establish branches in state A. But under section 36 (before the Riegle-Neal Act added section 36(g)), a national bank from state B could not establish a branch in state A under section 36(c) (unless it already had other branches there), even if state A expressly permitted it. Thus, except for grandfathered branches,[23] *the Commissioner's construction of permissible*

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branch retention power where none existed before, but the preservation of prior authority, when the new limitation begins to apply, if the specified condition of Riegle-Neal merger capability exists.

[23] Indeed, consideration of branches that are grandfathered under the McFadden Act shows that the Commissioner's theory that branch retention in a relocation is permitted only when the branches would be authorized under the McFadden Act is also internally inconsistent. The Commissioner argues that branches may be retained only when they would be permitted under the McFadden Act (which the Commissioner maintains means being permitted by State law). But, under the McFadden Act, grandfathered branches -- those in existence on February 25, 1927 -- are retained by national banks without any reference to state law. See 12 U.S.C. §§ 36(a), 36(b)(1)(B) & 36(b)(2)(B). Thus, even under the Commissioner's erroneous theory that section 36 applied to the retention of existing branches in a main office relocation, grandfathered branches could be retained solely under federal law, even if State law did not permit the branches. The treatment of grandfathered branches demonstrates that the Commissioner cannot argue both that retention of existing branches is governed by the McFadden Act and that it depends only on State law.

branch retention in an interstate main office relocation leads to a logical vicious circle: interstate branch retention is permitted when the interstate branch would be authorized by section 36(c), but section 36(c) does not authorize interstate branches.

In contrast to the Commissioner's position, the OCC's construction of sections 30(c) and 36(e)(2) -- i.e., that their purpose is to limit branch retention under section 30 and thereby change a power that national banks had before -- gives meaning and effect to the section and is a much simpler and more persuasive reading of this congressional action.

Similarly, the OCC's position is that the legislative history for these sections (quoted above at page 18) shows that Congress expected interstate relocations with branch retention to continue until June 1, 1997. In the Conference Report, Congress explicitly acknowledged the OCC's use of section 30 to approve several transactions in which a bank moved its main office from one state into another while retaining branches in the state left by the main office. The Report then says that the Riegle-Neal provision amends section 30 so that after June 1, 1997, "a national bank relocating its main office to another state may maintain branches in the first state only if those branches could have been established by a bank with its home state in the new State. See H.R. Conf. Rep. No. 651, supra at 57. This clearly endorses the branch retention under section 30 that had occurred and was expected to continue until June 1, 1997. It also explains how branch retention will change on June 1, 1997.

The Commissioner attempts to avoid this legislative history and make a claim that the legislative history should be read more narrowly by ignoring the first (and longer) paragraph

in the Conference Report and dwelling only on the second, shorter paragraph. The Commissioner asserts the language in the second paragraph referring to "appropriate State law and authority" means that the OCC is to defer to state laws that would bar relocation transactions, i.e., that Congress concurred with the retention of branches in an interstate main office relocation only when the retention of branches was in conformance with the McFadden Act and state law. In this regard, the Commissioner notes that the two OCC decisions prior to the Riegle-Neal Act involved banks that had grandfathered branches (i.e., pre-1927 branches that have special status under the McFadden Act) and then asserts that Congress' concurrence in the Conference Report is limited to such branches. However, in the two OCC decisions, branch retention under section 30 was clearly presented as the primary argument, and the argument based upon grandfathered branches was an alternative, secondary argument. See OCC First Fidelity/New Jersey Decision (Part II-B-1 (branch retention under section 30) & Part II-B-2 (grandfathered branches)); OCC NationsBank/Maryland National Decision (same). Without some express indication in the Conference Report that Congress was referring only to the secondary argument in its concurrence, we must assume Congress meant the entire analysis offered, and especially the primary argument.[24]

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[24] The Commissioner also argues that the reference in the second paragraph to the "OCC procedures in permitting relocation across State lines" and the statement that the Conferees "expect the OCC to continue to follow those procedures" mean that all subsequent applications approved must be virtual carbon copies of the first two. In particular, the Commissioner notes that the first two applications involved transactions in which, after the interstate relocation, the

Moreover, as explained in the OCC Bank Midwest Decision (at pages 58-61), we believe the language in the Conference Report referring to "appropriate state law and authority" is best understood as a reference to the manner in which the OCC's prior interstate decisions had addressed state law. In those decisions (the OCC First Fidelity/New Jersey Decision and the OCC NationsBank/Maryland National Decision), the OCC had determined that existing branches were retained in a main office relocation under section 30, without regard to section 36 and section 36's incorporation of state law. The OCC also had determined that section 30 preempted conflicting state law in this context. Then, in the subsequent applications to establish a branch at the former main office location and to merge and retain branches, we had interpreted those provisions of federal law that do incorporate aspects of state law and determined how those federal laws applied each state's law in various steps in the transactions. The OCC Bank Midwest Decision (at page 60) summarizes the positions taken by the OCC in prior decisions on the application of appropriate state law to each step of the transactions involved in the applications. On the precise issue of concern to the

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interstate relocated bank then merged with another bank in the State into which the main office had relocated. The Commissioner asserts that Sun World's proposal does not involve a subsequent merger and so does not comport with OCC's pre-Riegle-Neal procedures and so is not within the Conference Report's endorsement of the OCC's permitting interstate relocations. There is no basis for this suggestion. The critical feature of the first two transactions was the relocation application in them (which included the retention of existing branches in the original State, thus making an interstate bank). The Relocation Application here is similar.

Commissioner (whether contrary state law would bar branch retention under section 30), the two pre-Riegle-Neal decisions had set forth the OCC's view that section 30 operated independently of state law, albeit in a brief form since the issue was not squarely presented in the two cases.[25] A brief phrase in legislative history referring to the OCC's procedures in applying state law in prior applications is better understood as a reference to how the OCC actually had approached state law in the prior decisions than an indication of congressional intent to create a new doctrine that state laws were to apply to national banks in a new way in this area.

Finally, in addition to the detailed statutory and legislative history factors surveyed above, one fundamental fact overarches all considerations in determining the meaning of the congressional action in 1994. The OCC's position on sections 30 and 36 had been clearly set out in decisions in early 1994. These decisions and the OCC position were known to Congress and were a part of its deliberations in adopting the Riegle-Neal Act. If Congress had so fundamentally disagreed with the OCC's views and held views like the Commissioner's, then surely a much greater change in statutory language and clearer statements in legislative history disagreeing with the OCC would be expected.

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[25] See OCC NationsBank/Maryland National Decision (notes 43 & 44) (Maryland law); OCC First Fidelity/New Jersey Decision (note 41) (Pennsylvania law) & (note 44) (New Jersey law). See also McEnteer, 644 F.Supp. at 293-94 (section 30 preempts Pennsylvania State banking holding company law; State law also invalid under Commerce Clause); OCC Bank of New Jersey Decision (same); OCC Mark Twain Decision (section 30 preempts Kansas State bank holding company law; State law also invalid under Commerce Clause.)

iii. Congress intended existing limited interstate branching authority to continue during a transition period. The new Riegle-Neal interstate framework is not exclusive until June 1, 1997.

The Commissioner asserts that approval of Sun World's applications would violate the Riegle-Neal Act, circumventing the provisions governing interstate transactions under that Act. The Commissioner notes that in the Riegle-Neal Act Congress permitted the states to "opt-in" to or "opt-out" of the interstate merger authority created in the Act and permitted the states to determine whether to "opt-in" for de novo interstate branching. The Commissioner points to recent Texas legislation prohibiting interstate merger and branches. See note 30 below. The Commissioner apparently believes it violates the Riegle-Neal Act for Sun World to have branches in Texas through a main office relocation when Texas has adopted legislation prohibiting interstate branches. This mistaken belief stems from two sources: (1) a confusion about the exclusiveness of the Riegle-Neal framework and (2) a faulty premise that Congress empowered the states to determine whether to permit all forms of interstate branching, not only interstate branches under the two new Riegle-Neal authorities.

The Commissioner asserts that the Riegle-Neal Act is intended to be the exclusive means to branch interstate and that, if banks could use interstate main office relocations under section 30, then the authority permitted to the states to decide whether to participate in the Riegle-Neal Act's interstate branching authority would be undercut. However, the provision in the legislative history addressing the Riegle-Neal Act's exclusivity

clearly refers to the fact that the Riegle-Neal Act's authorities will be exclusive after May 31, 1997:

> The Conferees adopted provisions to assure that the comprehensive framework for interstate branching established by Title I will, when the provisions take effect, be the exclusive means for national and State banks to enter new States with interstate branches.
>
> Paragraphs (2) and (3) of section 102(b) amend the National Bank Act and the Federal Deposit Insurance Act, respectively, to state that when the interstate merger and branching provisions take effect, initial interstate entry into a host State may, with exceptions for certain emergency situations, occur only in accordance with this legislation. These provisions will assure that the conditions and safeguards which accompany initial interstate branching will apply to the establishment of interstate branching networks at the time those provisions take effect.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 56-57 (1994) (emphasis added). The provisions referred to are the provisions titled, "Exclusive Authority for Additional Branches," new sections 36(e) and 30(c) (for national banks) and new section 1828(d)(3) (for state nonmember banks). These are the provisions that declare that a bank may not acquire, establish, or operate a branch in a new state except under the specific provisions listed. As discussed above, section 36(e)(2) is the provision that limits a national bank's power to keep its existing branches after an interstate main office relocation. But these "exclusive authority" limitations begin to apply only on June 1, 1997. Thus, during the time until then Congress clearly did not

intend the Riegle-Neal Act's two new interstate branching authorities to be exclusive.

Underlying the Commissioner's specific arguments is the general theme that it is inherently inconsistent with the interstate branching framework created in the Riegle-Neal Act for banks to be able to have interstate branches by other methods, such as a section 30 relocation, and that therefore Congress could not have intended other methods to be permitted. As we discussed earlier, in the Riegle-Neal Act Congress authorized interstate branching by interstate merger transactions and by de novo interstate branches. Each of these authorities provides means by which the states can determine whether to participate in them or not. However, this power granted to the states applies only to the two new Riegle-Neal interstate authorities. Separately, in provisions that do not grant any additional power to the states, Congress also enacted other provisions that have the effect of making the two Riegle-Neal methods the exclusive means for national and state banks to enter new states with interstate branches. See 12 U.S.C. § § 36(e) (national banks) & 1828(d)(3) (state nonmember banks). These exclusivity provisions do not begin to limit other interstate branches until June 1, 1997. On the face of it, this clearly seems designed to provide that until then, any such other methods of interstate branching as may exist will continue in force alongside the two new Riegle-Neal methods. Then, after June 1, 1997, Congress terminates the other authorities, leaving the two Riegle-Neal Act authorities (and the other authorities listed in sections 36(e) and 1828(d)(3)) as exclusive.

It is not unreasonable for Congress to provide just such a transition period when it adopts new comprehensive legislation replacing whatever patchwork of existing practices was present

before. Here, Congress delayed the automatic federal authorization for interstate mergers for just over two and a half years until June 1, 1997. Similarly, Congress allowed other interstate branching authority (for both national banks and state banks) to continue during the same two and a half year transition period. Just as Congress did not impose interstate branching immediately upon Riegle-Neal's enactment, so also it did not make the new Riegle-Neal framework exclusive immediately upon enactment.

Moreover, it is worth remembering that state banks also enjoy the benefits of this transition period. For example, before the Riegle-Neal Act, some states had statutes allowing limited forms of interstate branching, such as allowing branching only among adjacent states or only for state savings banks or for state banks.[26] Such statutes would not qualify as opt-in statutes for Riegle-Neal Act purposes, since they are limited. But they are not rendered immediately invalid under the Riegle-Neal Act. State banks in two such states could have interstate branches

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[26] We are aware of at least two instances in which State banks used such limited State laws to form an interstate State bank. Before their Riegle-Neal implementing legislation, Connecticut, New York, and Rhode Island had such limited interstate branching statutes. In the multi-step transactions involved in the OCC Shawmut Decision (Connecticut and Rhode Island) and the OCC Chase Decision (New York and Connecticut), the applicants used an intermediate step in which an interstate State bank would be formed with State approval (in one instance with its main office in Connecticut and branches in Rhode Island, and in the other instance with its main office in New York and branches in Connecticut). The applicants used interstate State banks because national banks could not use the interstate branching authority under the State laws to form an interstate bank. Once the interstate State bank had been created, then it could convert into, or merge into, a national bank under 12 U.S.C. §§ 35, 36(b) & 215a.

under these laws. It is only on June 1, 1997, when the exclusivity provision of section 1828(d)(3) begins to limit other interstate branches, that a state bank could no longer acquire or establish an interstate branch under these limited state laws. Thus, just as the section 30 authority continues in force for national banks until June 1, 1997, so these limited state interstate branching laws continue in force for state banks until then. The OCC believes Congress intended to treat national banks and state banks consistently: the impact of the Riegle-Neal Act on limited interstate branching by national banks under section 30 is treated the same way as limited interstate branching by state banks under state law.

Indeed, these provisions bear the hallmarks of a classic legislative compromise. Some may have argued that section 30 never contained branch retention authority or that, if it did, it should end immediately upon the enactment of Riegle-Neal. Similarly, some may have argued that limited state interstate branching statutes should end immediately upon the enactment of Riegle-Neal, so that the Riegle-Neal framework would be exclusive from its inception. On the other hand, others may have argued that these other sources of interstate branching (retaining existing branches under section 30 for national banks, limited state interstate branching laws for state banks) should be allowed to continue indefinitely as a parallel authority to the Riegle-Neal framework. Congress crafted a compromise: the parallel authorities will be ended and the Riegle-Neal framework made exclusive, but only on June 1, 1997, when the Riegle-Neal framework is fully implemented.

3. **Conclusion.**

Accordingly, under section 30 a national bank may relocate its main office to any location within 30 miles, including locations across a state line. And, under section 30 and the transition provisions of the Riegle-Neal Act, after the interstate relocation of its main office, a national bank may continue to operate its existing branches in its original state. Thus, in the present Relocation Application, Sun World is legally authorized to relocate its main office from El Paso, Texas, to Santa Teresa, New Mexico, and to continue to operate its two existing branches in El Paso.

B. Sun World may Establish a New Branch at the Site of its Former Main Office in El Paso, Texas, under 12 U.S.C. § 36(c).

After its main office relocation, Sun World will be an interstate national bank. It will have its main office in Santa Teresa, New Mexico, and its existing two branches in El Paso, Texas. Sun World also has applied then to establish a new branch at the site of its former main office in El Paso, under 12 U.S.C. § 36(c). The Branch Application is a separate transaction from the main office relocation and retention of existing branches. After the relocation, if no other application were made, Sun World would have its main office in Santa Teresa and only its two existing branches in El Paso, but not an office at the former main office location in El Paso. In order to have a branch at that location, Sun World must apply to open a new branch there. Since it has continued its existing branches in El Paso in the relocation, this Branch Application is an application by an interstate national bank for an additional branch in one of the states in which it already has a branches.

This question has been considered before by the OCC and the courts. The Branch Application does not raise new issues, but only the application of established precedent for applying section 36(c) to interstate national banks.

The McFadden Act authorizes a national bank to establish new branches "at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question ... ." 12 U.S.C. § 36(c)(2). The interpretation of the statute adopted since at least 1974 has been that, for the purpose of establishing additional branches under section 36(c), an interstate national bank is "situated" in each state in which it has its main office or a branch: The bank can establish other branches within each state to the same extent as other national banks situated in that state, i.e., to the same extent that state allows its state banks to have branches within the state. See Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48 (9th Cir.), cert. denied, 419 U.S. 844 (1974). Both before and after the Riegle-Neal Act, the OCC has applied this principle from Seattle Trust in prior decisions involving national banks with operations in more than one state. See, e.g., OCC Bank Midwest Decision (Part II-B); OCC NationsBank/Maryland National Decision (Parts II-B-2 and III); OCC First Fidelity/New Jersey Decision (Parts II-B-2 and III). See also OCC Decisions listed in notes 5 and 6 above.

The Seattle Trust case involved the Bank of California, a national bank with its main office in San Francisco and branches in California. It also had grandfathered branches in Seattle, Washington, Tacoma, Washington, and Portland, Oregon. In 1970, it applied to the OCC for approval to establish a new branch in Seattle. The OCC approved the branch, concluding

that the Bank of California was situated in Washington for purposes of section 36 (c) because of its grandfathered branches and so could establish other branches in Washington as Washington law allowed Washington banks to do. The Ninth Circuit affirmed this conclusion. The court expressly held that the Bank of California was "situated" in Washington for section 36(c) purposes through its grandfathered branch. Seattle Trust, 492 F.2d at 51.

The OCC has consistently applied this interpretation of "situated" in section 36(c) -- that a bank is situated in the state(s) where it has branches as well as the state of its main office. This statutory language and interpretation continue after the Riegle-Neal Act. Existing branch authority in sections 36(a), 36(b), and 36(c) is not changed in the Riegle-Neal Act. The statutory language and legislative history clearly contemplate that existing authority under these provisions remains in effect. First, the new provision on exclusive authority for additional branches (new subsection 36(e)) is not operational until June 1, 1997. In addition, even after that date, it expressly does not apply in states in which the bank has its main office or already has a branch; and it also expressly includes, as a continuing source of authority, branching authorized "under this section" (i.e., Revised Statutes § 5155, which includes existing subsections 36(a), (b), and (c)). See Riegle-Neal Act § 102(b)(1) (adding new subsection (e) to section 36).[27]

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[27] Indeed, the section of the Riegle-Neal Act that sets out the new source of interstate branching authority in the new interstate merger transaction provides that interstate banks formed under its provisions ("section 44 interstate banks") have a similar rule covering the establishment of additional branches by section 44 interstate banks within each state in which they have existing branches. See

Moreover, another provision added to 12 U.S.C. § 36 in the Riegle-Neal Act further supports Sun World's authority to establish the branch at the former location of its main office in El Paso. Congress added section 36(f) to address the law applicable to interstate branching operations at branches in a host state of an interstate national bank. Among other provisions, section 36(f)(1)(A) provides that "the laws of the host State regarding . . . establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except -- (i) when Federal law preempts the application of such State laws to a national bank . . . ." 12 U.S.C. § 36(f)(1)(A). The provisions of section 36(f) apply to any interstate national bank (i.e., to the branches in a host state of any out-of-state national bank), without regard to the manner in which the national bank became interstate. They apply to Sun World even though it did not obtain its out-of-state branches through one of the two new interstate branching authorities adopted in the Riegle-Neal Act.

Riegle-Neal Act § 102(a) (new section 44(d)(2)). Similarly, the provisions in the Riegle-Neal Act regarding state opt-in to permit interstate branching through de novo branches apply only to the de novo establishment of a bank's first branch in another State (other than the bank's home State) "in which the bank does not maintain a branch." See Riegle-Neal Act § 103(a) (adding new subsection 36(g)). It does not apply to situations where a bank is establishing a new branch in its home State or in one of the States in which it already has a branch. In those situations, existing law under section 36(c) still applies. See Decision on the Applications of Community National Bank (OCC Corporate Decision No. 96-22, April 19, 1996) (Part II-B).

Thus, under this provision, but for the preemption exception, it is clear that, once an out-of-state national bank has branches in a host state, then the subsequent establishment of another branch within the host state is treated like the establishment of intrastate branches within the host state by the host state's state banks. Here, a Texas state bank could establish a branch at the site of Sun World's former main office in El Paso, and thus under section 36(f), Sun World would be able to do likewise. However, since there are federal laws specifically governing in-state branching by national banks (i.e., 12 U.S.C. § § 36(b), 36(c), 36(g)(2)(B), & 1831u(d)(2)), those laws would preempt this provision under the preemption exception. But, since those laws also incorporate, and make applicable to national banks, state law for in-state branching by state banks, as discussed above, the outcome is generally the same.[28] Thus, with respect to Sun World's Branch Application, under the OCC's interpretation of section 36(c), Sun World is authorized to establish the branch at the site of its former main office in El Paso under section 36(c). And, if section 36(c) does not apply in this way, then section 36(f)(1) would be applicable, and the branch authorized under section 36(f)(1).

The Texas Bank Commissioner objected to the Branch Application. The Commissioner's argument, similar to the Ghiglieri court's, appears to be that a New Mexico state bank is

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[28] In some instances, there may be a difference between the manner in which state law would apply if applied directly in section 36(f)(1)(A) and the manner in which it is incorporated in the other statutes. However, that is not the case here, and so we need not address which statutes would take precedence in such an instance.

not permitted to establish branches in Texas, because of Texas' law prohibiting out-of-state banks from establishing branches in Texas, and so a national bank in New Mexico is similarly barred from establishing branches in Texas. We agree that, if Sun World did not have its existing branches in Texas, Sun World would not have authority under section 36 to establish the new branch in El Paso. But, after the relocation, Sun World does have its existing branches in Texas. This is, in fact, merely a restatement of the Commissioner's objection to the retention of existing branches in the Relocation Application, and was addressed above. The Branch Application is a second transaction that occurs after and depends upon the first. Thus, in analyzing the legality of the Branch Application, the Relocation Application is assumed to have occurred.

Once Sun World is an interstate bank, with existing branches in Texas, the position that New Mexico state branching law is incorporated into section 36(c) with respect to branches in Texas, or that Texas law prohibiting "out-of-state" banks from establishing branches in Texas, is incorporated into section 36(c) for additional branches in Texas is clearly erroneous. The fact that Texas has enacted legislation purporting to "opt-out" of the interstate branching authorities in the Riegle[-]Neal Act relates only the power to have branches under 12 U.S.C. § § 36(d), 36(g) & 1831u. It has no bearing on sections 36(c) or 36(f). When an interstate national bank is applying to establish an additional branch in one of the states in which it already has branches (a host state), the law is clear that the applicable state branching law incorporated into federal law for the national bank is the host state's statute for the establishment of in-state branches by the host state's own state banks. Seattle Trust established this construction of section 36(c) for interstate

national banks. Section 36(f) leads to the same result if section 36(c) is not so applied. The Riegle-Neal Act has the same rule for additional branches in a state by interstate national banks formed under the new interstate provisions of the Riegle-Neal Act. See 12 U.S.C. § § 36(g)(2)(B) & 1831u(d)(2).[29]

Therefore, after the main office relocation, Sun World continues to be situated in Texas (as well as New Mexico) for section 36(c) purposes by virtue of its existing branches there. And thus, as a matter of federal law under section 36, it can establish additional branches in Texas to the same extent that national banks whose main office is in Texas may establish branches. Under Texas statute, a Texas state-chartered bank is permitted to "establish and maintain branches at any location" without geographic limit. See Tex. Rev. Civ. Stat. Ann. art. 342-3.201(a) & 342-3.203 (West Supp. 1996). A Texas state bank could establish a new branch at the former location of Sun World's main office in El Paso. Thus, a national bank situated in Texas could establish a new branch at that location under 12 U.S.C. § 36(c). Therefore, Sun World may establish a new branch at that location under section 36(c).

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[29] The Ghiglieri court's analysis of the branch application in that case was similarly flawed. Once the court determined that the bank's existing branches in Arkansas could not be retained under section 30, there was no need to address the establishment of the new branch at the old main office site, since the legal authority for the new branch under section 36(c) depended upon the bank's being situated in Arkansas because of its existing branches. If there are not existing branches in Arkansas, then the court's additional discussion that both Texas and Arkansas law apply through section 36(c) to the bank's authority to establish an additional branch in Arkansas, as well as the court's manner of applying Arkansas law, are clearly contrary to the federal statutes, as set out in the text above.

C. State Laws that Conflict with Federal Law Conferring this Authority on National Banks Cannot be Applied to Prevent or Restrict these Applications.

As we have seen, the transactions proposed by Sun World in these Applications are authorized under federal law, specifically 12 U.S.C. § § 30 and 36(c). The Texas Bank Commissioner, the New Mexico Bank Commissioner, and IBAT objected to them, asserting the transactions would violate both federal and state law. The federal law issues were discussed above in Sections A and B. With respect to the state law objection, the only provisions cited that it is alleged the Applications would violate are provisions of Texas law. The Texas Commissioner asserts that Texas law specifically prohibits interstate branching and cites recent legislation.[30] The

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[30] The Commissioner cites Article 489f which is in effect from August 28, 1995 until September 2, 1999, and provides as follows:

> Sec. 2. Notwithstanding any other law:
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> (1) pursuant to Section 44(a)(2), Federal Deposit Insurance Act (12 U.S.C. Section 1831u(a)(2)), a domestic bank may not engage in a merger transaction involving an out-of-State bank;
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> (2) an out-of-State bank may not establish a de novo branch in this State or acquire a branch in this State by purchase or other means;
>
> (3) a domestic bank may not establish a de novo branch in a State other than this State or acquire a branch in a State other than this State by purchase or other means.

Commissioner also maintains a national bank may not engage in branch banking if state banks cannot have the same branches, and notes again the Texas prohibition. The Commissioner appears to believe that, if state banks are not specifically authorized to have interstate branches between New Mexico and Texas (and indeed are prohibited), then national banks also may not do so, whether directly or by retaining branches in a main office relocation. In other words, the Commissioner's view is that a national bank in Sun World's position can have branches in Texas only in accordance with express state law, and that the absence of such express New Mexico and Texas authority for interstate branches by state banks, and especially in view of

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Tex. Rev. Civ. Stat. Ann. art 489f (West Supp. 1996). In addition, IBAT refers to a provision of the Texas Constitution (Art. XVI, Sec. 16) that IBAT states has been interpreted by the Texas Attorney General to mean that foreign corporations are not permitted to exercise banking privileges in Texas. IBAT does not identify the specific portion of Art. XVI, Sec. 16 or the Texas Attorney-General opinion. We assume IBAT is referring to the following paragraph from the Texas Constitution:

> No foreign corporation, other than the national banks of the United States domiciled in this State, shall be permitted to exercise banking or discounting privileges in this State.

Texas Constitution Art. XVI, Sec. 16(a) (third paragraph). It is not clear this provision would necessarily bar Sun World's proposal. In particular, it is not clear how the provision would be intended to apply to an out-of-State national bank that lawfully operated branches in Texas under federal law, especially in light of 12 U.S.C. § 36(f). If this provision of the Texas Constitution is construed to bar out-of-State national banks from operating branches in Texas, then, with respect to Sun World's applications, it is subject to the same analysis as the Texas statute cited by the Commissioner and discussed in this section.

Texas' prohibition, means that Sun World's branches are unlawful.

However, this is incorrect as a matter of law for several reasons. First, the authority of Sun World to have branches in Texas is determined by federal law, not state law. Even though some parts of the applicable federal law incorporate state law, the authority of national banks to have branches is a matter of federal law, and a national bank's branch is unauthorized only if it is impermissible under federal law. The Commissioner's objections under the applicable federal law were addressed above. Under federal law, Sun World may retain its two existing branches in El Paso in its main office relocation under the authority of 12 U.S.C.§ 30, and state law is not a factor under section 30 at all. See, e.g., Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-93; OCC Bank Midwest Decision (Parts II-A, II-D, III). And so the existing branches in El Paso are retained without reference to either New Mexico or Texas law. This interpretation of sections 30 and 36 was expressly approved by Congress in the Riegle-Neal Act. Then, also under federal law, Sun World may establish a new branch at the former location of its main office in El Paso (and other additional new branches in New Mexico or Texas) under 12 U.S.C. § 36(c). While state law is a factor under section 36(c), it is federal law that determines which aspects of state law are so incorporated, and in what manner they are incorporated. Here, the state law incorporated for the establishment of additional branches within Texas is the law for branching within Texas by Texas state banks because Sun World is situated in Texas for section 36 purposes. See, e.g., Seattle Trust, 492 F.2d at 51;

Part II-B above.[31] Thus, the fact that Texas law does not permit New Mexico state banks to establish branches in Texas, or that New Mexico law may not permit New Mexico state banks to establish branches in Texas, is immaterial to Sun World's authority to establish the new branch in El Paso under section 36(c). Congress adopted a similar state-by-state framework for an interstate national bank's establishment of additional branches within each state in the Riegle-Neal Act. See 12 U.S.C. § § 36(f)(1), 36(g)(2)(B) & 1831u(d)(2) (discussed above at note 27).

Moreover, the Commissioner's characterization of this matter as a "violation of state law" reveals that she has confounded two quite distinct questions. First, there is the issue of what state laws are incorporated into the McFadden Act and so are made applicable to national banks. This is a matter of federal law. Once it is determined what state laws are incorporated and the manner in which they are incorporated, then if a proposed transaction by a national bank would not be

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[31] In general, for purposes of section 36(b) and section 36(c) of the McFadden Act, the State law that is incorporated is State law dealing with branching by that State's banks within the State. State laws pertaining to the activities of the State's banks outside the State or to the activities of out-of-State banks within the State are not within the scope of what the McFadden Act refers to. See, e.g., OCC PNC/Kentucky Decision (at page 12, note 10); OCC Bank Midwest Decision (Parts II-B, II-C-2, II-D, III-B-1-b). Thus, any provisions of New Mexico or Texas law that permit or do not permit State banks to have branches in other States, that authorize out-of-State banks to have branches within the State, or that prohibit out-of-State banks from operating branches in the State are not the State laws incorporated in sections 36(b) and 36(c). Such laws are relevant for the 12 U.S.C. §§ 36(g) & 1831u.

permitted under the McFadden Act (incorporating the state law), then it might be said the transaction "violates state law" in that indirect sense, although strictly speaking it is the federal law that is being violated. In these Applications, the OCC has determined that the transactions do not violate federal law, including the applicable state law incorporated in the McFadden Act. Second, there is the issue of whether a state law that purports to apply to a national bank by operation of the state law itself is being violated, including determining whether the state law applies or not. In this regard, once it has been determined what the applicable federal law is (including those parts of state law incorporated into federal law), then the question whether other remaining provisions of state law conflict with the applicable federal law is a matter for standard preemption considerations.[32]

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[32] Like the Commissioner, the Ghiglieri court similarly confounded these distinct issues in declaring that, since the McFadden Act incorporates State law, there can be no conflict between State and federal law with respect to that section. Since the manner in which federal incorporates State law into the McFadden Act to apply to national banks can be different from the manner in which the State law applies directly to State banks, there can be conflict, thus giving rise to preemption. For example, in a series of cases, the courts have determined that a "state bank" for McFadden Act purposes includes State savings and loan associations, as well as State commercial banks, and therefore State branching law for branching by those types of institutions was incorporated into section 36 for branching by national banks, even if it permitted greater branching than the State permitted for its State commercial banks. See, e.g., Independent Bankers Ass'n of America v. Clark, 917 F.2d 1126 (8th Cir. 1990); Department of Banking & Consumer Finance v. Clarke, 809 F.2d 266 (5th Cir.), cert. denied, 483 U.S. 1010 (1987). Thus, in those States, State laws applying the State's branching laws for State commercial banks to national banks would conflict with the federal branching authority of the McFadden Act.

In Sections A and B above, we determined that federal law, including the appropriately incorporated state law, authorizes the proposed transactions in these Applications. We now consider the impact of other state law -- the Texas laws raised by the Commissioner and IBAT -- on the Applications. First, contrary to the Commissioner's assertion, it is not clear the Texas statute, if read strictly and literally, would prohibit Sun World's proposed transactions. The Texas statute prohibits a merger between a Texas bank and an out-of-state bank. There is no merger here. The Texas statute declares that an out-of-state bank may not establish a de novo branch in Texas or acquire a branch. Sun World's retention of its existing two branches in El Paso is not the establishment or acquisition of a branch. Sun World's establishment of the new branch at the former location of its main office in El Paso is not the establishment of a de novo branch within the meaning of interstate branching statutes because it is an additional branch in a state in which the bank already has a branch.[33] Thus, Sun

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[33] The Texas interstate branching statute does not define "de novo branch." But since the Texas statute was adopted in response to the Riegle-Neal Act, it is reasonable to assume that similar terms in the Texas statute are intended to incorporate the same concept of de novo branching by an out-of-State bank as it is used in the Riegle-Neal Act -- i.e., the initial establishment of a new branch only in a State in which the bank does not already have a branch. See 12 U.S.C. § 36(g)(1) (introductory clause). Even if "de novo branch" is expanded to include even additional branches, then only the Branch Application, not the Relocation Application (including the retention of existing branches), would violate the Texas statute.

World's proposed transactions do not appear to come within the scope of the Texas statute.

Second, if the Texas statute is interpreted in the way the Commissioner seems to believe and is construed as intending to ban an out-of-state bank from maintaining branches in Texas in any manner whatsoever, then the effect would be to prevent Sun World from keeping its existing branches in El Paso and from establishing the additional branch at the former main office location in El Paso. Thus, the Texas laws would conflict with the authority granted to national banks under federal law in 12 U.S.C. § § 30 and 36. Since it would directly conflict with federal law, it would be preempted under the Supremacy Clause. See, e.g., Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982); Franklin National Bank v. New York, 347 U.S. 373, 378-79 (1954). Indeed, the courts have previously ruled that section 30 preempts contrary state laws. See, e.g., Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-94. See also OCC Bank Midwest Decision (Parts II-A, II-D, and III-A) (discussion of section 30 and of preemption generally). The Supreme Court recently reiterated the status of national banks as creatures of the federal government and the impact that has on determining when state laws that prohibit or hinder a national bank from exercising the powers granted under federal law are preempted. See Barnett Bank of Marion County, N.A. v. Nelson, No. 94-1837, slip op. at 6-8, 517 U.S. ___, 134 L.Ed.2d 237, 245-46 (March 26, 1996). Accordingly, the Texas law would be preempted and could not apply to prohibit, restrict, limit, or condition Sun World's main office relocation, the continuation of its existing

branches in El Paso, and the establishment of the additional branch in El Paso.[34]

The Commissioner might argue that the Texas statute is immune to preemption because it was enacted pursuant to congressional authorization in the Riegle-Neal Act. In the Act, Congress permitted the states to determine whether to opt-out of, or to opt-in early for, Riegle-Neal mergers and permitted the states to determine whether to opt-in at all for Riegle-Neal de novo interstate branching. See 12 U.S.C. § 1831u(a)(3) (early mergers) & 36(g) (de novo branches). This Texas statute purportedly was enacted for that purpose. However, that congressional authorization extends only to deciding whether or not to participate in the two new federal interstate branching authorities created in the Riegle-Neal Act. Congress addressed the continuation of existing authority under sections 30 and 36 in a separate provision of the Riegle-Neal Act (new 12 U.S.C. § § 30(c) & 36(e)) that does not depend on either of the new

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[34] In reviewing the preemption issues in this corporate application, we have not used the notice and comment procedures added in the Riegle-Neal Act for preemption determinations involving State laws in the areas of community reinvestment, consumer protection, fair lending, and establishment of intrastate branches. See Riegle-Neal Act § 114 (adding new Revised Statutes § 5244). First, we include the preemption analysis here only because the Texas Commissioner asserts the transactions violate State law, even though the State law could be interpreted to avoid conflict. Second, even if the Texas statute did cover these transactions and even if it were within one of the four areas, court cases and prior OCC decisions have previously addressed the preemptive effect of federal law on statutes such as these. Thus, this matter would qualify for the exception in section 5244(c)(1)(A). Finally, it is not clear that the new procedure in the Riegle-Neal Act covers matters that do not arise in an opinion letter or interpretive rule, but in a corporate application decision in a process that has its own public notice and comment requirement.

authorities and does not include any grant of authority to the states to determine whether interstate branches under other, existing statutes may occur. Congress decided to leave the limited existing authority in effect, and, unlike the new Riegle-Neal authorities, did not give the states the power to opt-out of it.

Similarly, if applied here in a non-Riegle-Neal transaction, the Texas law would violate the Commerce Clause because it would impose an impermissible burden on interstate commerce since it bars out-of-state businesses from entry into Texas and does so without congressional authorization. The Commerce Clause limits the power of the states to erect barriers against interstate trade. See, e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980). The Texas statute would not be authorized under any federal law that would shelter it from Commerce Clause scrutiny. See OCC Bank Midwest Decision (Part III-B-1). In particular, it would not be authorized by the Riegle-Neal Act, since the authority Congress conferred on the states in that Act is limited to the interstate branching authorities created in the Act, and Congress itself left other interstate authorities in place until June 1, 1997. Since the state statute is plainly and exclusively directed against institutions from other states, it is subject to strict scrutiny under a virtual per se test, and would be invalid under well-established Commerce Clause principles. See, e.g., BT Investment Managers, 447 U.S. at 36; Philadelphia v. New Jersey, 437 U.S. 617, 624, 626-27 (1978). Moreover, even if the more flexible test used in some circumstances were applicable here, see Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the state statute would violate the Commerce Clause both because it does not serve constitutionally legitimate local interests and because

they impose more than an incidental burden on interstate commerce. See BT Investment Managers, 447 U.S. at 42-44; OCC Bank Midwest Decision (Part III-B-2) (Commerce Clause analysis of Kansas statute prohibiting out-of-state banks from having branches in Kansas). Therefore, if the Texas statute were construed as the Commissioner believes and purported to bar Sun World from having branches in El Paso, it would violate the Commerce Clause and could not be applied to interfere with Sun World's proposed transactions here.

D. Conclusion

In conclusion, our legal analysis of these Applications follows our analysis of prior interstate main office relocation decisions and other prior decisions involving interstate national banks. The relocation of Sun World's main office from El Paso, Texas, to Santa Teresa, New Mexico, is authorized under 12 U.S.C. § 30. Sun World may continue to operate its two existing branches in El Paso under section 30. Sun World may also establish a new branch at the former location of its main office in El Paso under 12 U.S.C. § 36(c). The Riegle-Neal Act re-affirmed the federal authority for these transactions. State laws that would prohibit or limit the exercise of these federally granted powers are preempted. Accordingly, these Applications are legally authorized.

III. ADDITIONAL STATUTORY AND POLICY REVIEWS

The Community Reinvestment Act ("CRA") requires the OCC to take into account the applicant's record of helping to

meet the credit needs of its entire community, including low- and moderate-income neighborhoods, when evaluating certain applications. See 12 U.S.C. § 2903. Sun World converted from a federal savings bank to a national bank on January 31, 1996. At that time it had an outstanding rating with respect to CRA performance assigned by the Office of Thrift Supervision. No public comments were received by the OCC relating to these Applications that would cause the OCC to question the bank's performance in complying with the CRA. In addition, all other national bank subsidiaries of NationsBank Corporation are rated outstanding or satisfactory with respect to CRA performance.

The relocation and operation of interstate branches should have no adverse effect on the bank's CRA performance. The bank will continue the same CRA statement, policies, programs, and personnel that it has today. The relocation and operation of interstate branches do not alter the bank's obligation to help meet the credit needs of its community in the El Paso area on both sides of the state line.

IV. CONCLUSION AND APPROVAL

For the reasons set forth above, the Relocation Application and the Branch Application are legally authorized under 12 U.S.C. § § 30 and 36. The transactions also meet the criteria for approval under other statutory factors. Accordingly, these Applications are hereby approved.

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Julie L. Williams Date
Chief Counsel

Application Control Numbers:
96-ML-07-0013 & 96-ML-05-0130

Comptroller of the Currency
Administrator of National Banks

Washington. D.C. 20219

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATIONS OF COMMERCIAL NATIONAL BANK OF TEXARKANA, TEXARKANA, ARKANSAS

March 8, 1995

I. INTRODUCTION

On December 5, 1994, Commercial National Bank of Texarkana, Texarkana, Arkansas ("CNB") filed an application with the Office of the Comptroller of the Currency ("OCC") for approval to change the location of its main office from Texarkana, Arkansas, to Texarkana, Texas, under 12 U.S.C. § 30 ("the Relocation Application"). The location in Texarkana, Texas, is less than two miles from the city limits of Texarkana, Arkansas. After the relocation of its main office, the Bank will continue to operate its existing branches in Arkansas. On December 5, 1994, CNB also applied for approval to establish a branch at the former location of its main office in Texarkana, Arkansas, under 12 U.S.C. § 36(c) ("the Branch Application").

As of December 31, 1994, CNB had approximately $92 million in assets and $82 million in deposits and operated three branch offices in Arkansas, two in Texarkana and one in Fouke, and one stand-alone customer-bank communication terminal branch (i.e., an automated teller machine) in a grocery store in Texarkana. All of these are in Miller County, Arkansas. CNB is a subsidiary of Commercial Bracshares, Inc., a one bank holding company ("Commercial Bancshares"). Through the main office relocation,

CNB will be able to have banking offices in both the Texas and the Arkansas portions of Texarkana.

By letter dated January 13, 1995, and received by the OCC on January 18, 1995, the Arkansas State Bank Commissioner objected to the Applications. The Arkansas Commissioner asserted the Applications would be in contravention of Arkansas law because, after the relocation into Texas, CNB would be a bank domiciled in Texas and Arkansas does not provide for or permit interstate branching. The Commissioner also claimed that approval of the Applications would be inconsistent with the Riegle-Neal Act. The Riegle-Neal Act is discussed in Part II-C, and the Commissioner's objections are discussed in Part II-D.

By letter dated January 18, 1995, and received by the OCC on January 23, 1995, the Texas State Bank Commissioner also objected to the Applications. The Texas Commissioner asserted the Applications would be contrary to Texas law in two respects. First. the Texas Commissioner states that Texas does not permit its banks to have branches in another state, and so CNB's maintenance of branches in Arkansas, after it has relocated its main office into Texas, would be contrary to applicable branching law. Second, the Texas Commissioner alleges that Commercial Bancshares would be in violation of Texas' bank holding company provisions that allow an out-of-state bank holding company to acquire a bank in Texas only if it has been in existence for five years. In addition, just as the Arkansas Commissioner, the Texas Commissioner also claimed that approval of the Applications would be inconsistent with the Riegle-Neal Act. The Riegle-Neal Act is discussed in Part II-C, and the Commissioner's objections are discussed in Part II-D.

II. LEGAL AUTHORITY

The OCC has considered transactions involving interstate main office relocations, interstate mergers, and interstate branching in a number of prior applications. Before the passage of the Riegle-Neal Act, the OCC had authorized the relocation of a national

bank's main office to another location across a state line in several decisions. In two of those decisions, the bank -- like CNB in the present application -- would also continue to operate its existing branches in its original state. See Decision of the Office of the Comptroller of the Currency on the Applications of American Security Bank, N.A. Washington, D.C., and Maryland National Bank, Baltimore, Maryland (OCC Corporate Decision No. 94-05, February 4, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695 ("OCC NationsBank/Maryland National Decision"); Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Pennsylvania, Philadelphia, Pennsylvania, and First Fidelity Bank, N.A., New Jersey, Newark, New Jersey (OCC Corporate Decision No. 94-04, January 10, 1994), reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 ("OCC First Fidelity/New Jersey Decision"). Other decisions involved only the interstate relocation of the main office.[1] In addition, there were a

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[1]See, e.g., Decision on the Applications of the First National Bank of Polk County (OCC Corporate Decision No. 94-21, April 28, 1994) (relocation from Tennessee into Georgia). The OCC also approved national bank main office relocations under section 30 from Missouri into Kansas, from New Jersey into Pennsylvania, from Alabama into Georgia, and from Washington into Idaho. See Decision on the Application of Mark Twain Bank, N.A. Independence, Missouri, to Relocate its Main Office to Overland Park, Kansas (1985), reprinted in [1984-85 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 86,180; Decision on the Application of the Bank of New Jersey, N.A., Moorestown, New Jersey, to Relocate its Main Office to Philadelphia, Pennsylvania (1986); Decision on the Application of South Trust National Bank, Phoenix City, Alabama, to Relocate its Main Office to Columbus, Georgia (1989); Decision on the Application of the First National Bank of Spokane, Spokane, Washington, to Relocate its Main Office to Coeur D'Alene, Idaho (1991). The OCC also has approved interstate relocations in which the relocating bank immediately merged with an affiliated bank in the other state and went out of existence as a separate entity. See Relocation of Midlantic National Bank/Delaware, Wilmington, Delaware, to Carneys Point, New Jersey, and Merger with Midlantic National Bank, Newark, New Jersey (1990); Relocation of Central Atlantic National Bank from Newark, Delaware, to Aberdeen, Md, and Merger with Maryland National Bank, Baltimore, Md (1991).

number of other applications involving other types of interstate merger and branching transactions.[2]

Moreover, in recent months since passage of the Riegle-Neal Act, see Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994), the OCC has approved additional interstate applications.[3] In those applications we considered the

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[2]See Decision on the Application to Merge Girard Bank, Bala Cynwyd, Pennsylvania, into Heritage Bank N.A., Jamesburg, New jersey, with the Title of Mellon Bank (East) N.A. (March 27, 1984), reprinted in [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,925 ("OCC Mellon Decision") (in 1984 Heritage had a grandfathered branch in Philadelphia; the 1984 transaction was not consummated and Heritage later became part of Midlantic National Bank); Decision on the Application of State Savings Bank, Southington, Connecticut, to Convert into a National Banking Association, State Savings Bank, N.A., and Merge into Connecticut National Bank, Hartford, Connecticut (OCC Merger Decision No. 91-07, April 8, 1991), available in 1991 OCC Ltr. LEXIS 73 ("OCC Shawmut Decision") (both banks owned by Shawmut National Corporation; at the time of conversion State Savings Bank had branches in Rhode Island); Decision on the Application for the Merger of First Peoples National Bank, Kingston, Pennsylvania, with and into First Fidelity Bank, N.A., Salem, New Jersey (OCC Corporate Decision No. 94-07, February 23, 1994) ("OCC First Peoples Decision"); Decision on the Applications to Merge NationsBank of D.C., N.A., Maryland National Bank, and NationsBank of Maryland, N.A. (OCC Corporate Decision No. 94-22, April 29, 1994) ("OCC NationsBank/D.C.-Maryland Decision"); Decision on the Application for the Merger of Continental Bank, Norristown, Pennsylvania, into Midlantic National Bank, Newark, New Jersey (OCC Corporate Decision No. 94-37, August 12, 1994) ("OCC Midlantic Decision").

[3]See, e.g. Decision on the Applications of Capital Bank, N.A., Washington, D.C. (OCC Corporate Decision No. 94-45, October 13, 1994); Decision on the Applications of First Fidelity Bank, N.A., New York and First Fidelity Bank, N.A. (OCC Corporate Decision No. 94-42, October 20, 1994) ("OCC First Fidelity/New York Decision"); Decision on the Applications of National Westminster Bank USA and National Westminster Bank NJ (OCC Corporate Decision No. 94-43, October 20, 1994) ("OCC NatWest Decision"); Decision on

impact of the new interstate branching legislation on national banks' authority under existing law. In particular, in one decision, a State bank commissioner objected to the transaction, arguing that the maintenance of interstate branches in the state would violate a state law and also raising interpretive questions under the Riegle-Neal Act. See Decision of the Office of the Comptroller of the Currency on the Applications of Bank Midwest of Kansas, N.A., and Bank Midwest, N.A. (OCC Corporate Decision No. 95-05, February 16, 1995) ("OCC Bank Midwest Decision"). In that decision, because of the important issues raised by the objection, we revisited our analysis of existing law and thoroughly considered the impact of the Riegle-Neal Act on existing authority and the applicability of state law.

So, these Applications are similar to a number of prior interstate relocation, merger, and branching applications approved by the OCC and do not raise new legal issues. The legal analysis and authorities are set forth in the prior decisions, and only a summary will be presented here. The earlier decisions should be consulted for the full analysis. In particular, because of the state commissioners' objections in this case, the analysis of similar state law issues and the Riegle-Neal Act in the OCC Bank Midwest Decision should be consulted. Accordingly, these Applications are legally authorized.

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the Applications of UMB First National Bank and United Missouri Bank of St. Louis, N.A. (OCC Corporate Decision No. 94-44, October 31, 1994) ("OCC United Missouri Decision"); Decision on the Applications of First Fidelity Bank, N.A., and The Bank of Baltimore (OCC Corporate Decision No. 94-47, November 4, 1994); Decision on the Applications of Sequoia National Bank and Sequoia National Bank, Maryland (OCC Corporate Decision No. 94-46, November 30, 1994); Decision on the Applications of NationsBank of South Carolina, N.A., and NationsBank of North Carolina, N.A. (OCC Corporate Decision No. 95-06, December, 1994) ("OCC NationsBank/Carolinas Decision"); Decision on the Applications of CoreStates Bank, N.A., and New Jersey National Bank (OCC Corporate Decision No. 95-04, February 6. 1995).

A. The Relocation of a National Bank's Main Office Across State Lines and Continued Operation of Branches in its Original State are Authorized under 12 U.S.C. § 30.

1. The Relocation of CNB's Main Office from Texarkana, Arkansas, to Texarkana, Texas, is Authorized under 12 U.S.C. Section 30.

In the Relocation Application, CNB applied to change the location of its main office from Texarkana, Arkansas, to Texarkana, Texas, a distance of less than two miles. CNB will continue to operate its existing branches in Arkansas. After the relocation, CNB will be an interstate national bank, with its main office in Texas and branches in Arkansas.

The relocation of CNB's main office from Texarkana, Arkansas, to Texarkana, Texas, is legally authorized under 12 U.S.C. § 30. Section 30 authorizes a national bank to change the location of its main office to any location within 30 miles of the limits of the city in which its main office is located. 12 U.S.C. § 30(b). Such a relocation, even across state lines, is authorized by the literal language of the statute, and nothing in the legislative history gives any reason not to adhere to the literal language. The authority to relocate a main office is not limited by the McFadden Act, 12 U.S.C. § 36. See, e.g., Ramapo Bank v. Camp, 425 F.2d 333, 340-46 (3d Cir.), cert. denied, 400 U.S. 828 (1970); Traverse City State Bank v. Empire National Bank, 228 F.Supp. 984, 992 (W.D. Mich. 1964). The Bank Holding Company Act also does not apply to main office relocations. See Synovus Financial Corporation v. Board of Governors of the Federal Reserve System, 952 F.2d 426, 434-37 (D.C. Cir. 1991); McEnteer v. Clarke, 644 F.Supp. 290, 292-93 (E.D. Pa. 1986). See also State of Idaho Department of Finance v. Clarke, 994 F.2d 1441, 144749 (9th Cir. 1993); Federal Reserve Board, Rescission of Policy Statement Requiring Application for Relocation of a Subsidiary Bank to Another State, 57 Fed. Reg. 9973 (March 23, 1992) (rescinding former 12 C.F.R. § 225.144). Finally, section 30 preempts state

laws that conflict with the authority it confers on national banks. See, e.g., Ramapo Bank; McEnteer; Traverse City State Bank. Thus, the literal language of section 30 must be given full effect. National banks are authorized to move their main office to any location within 30 miles, even across state lines. See OCC Bank Midwest Decision (Part II-A-1); OCC NationsBank/Maryland National Decision (Part II-A); OCC First Fidelity/New Jersey Decision (Part II-A).

2. CNB's Continued Operation of its Existing Branches in Arkansas is Authorized.

When it relocates its main office to Texarkana, Texas, CNB will continue to operate its existing branches in Arkansas. In three of the OCC's earlier decisions involving the relocation of a national bank's main office across a state line and the continuation of existing branches in the original state, we extensively analyzed the legal authority for the continued operation of existing branches and concluded that continued operation of such existing branches is legally authorized. When a national bank relocates its main office under section 30, it may continue to operate its existing branches as an implied, but necessary, adjunct to the express authority to move the main office. The statutory language of sections 30 and 36 does not expressly address this area. The OCC concluded that this was Congress' intent by examining the overall statutory framework and its historical development. Congress enacted section 30, allowing the main office to relocate, without requiring the divestiture, re-examination, or re-authorization of existing branches. Congress subsequently amended sections 30 and 36 numerous times without indicating any intent to subject the existing branches of a relocating bank to section 36. During this development, OCC and court decisions had opined that sections 30 and 36 operated independently. In the absence of express congressional action requiring that existing lawfully established branches be re-subjected to a de novo analysis under section 36 and divested, we concluded that the intention of the statutory scheme, considered as a whole, was that existing branches were continued.

See OCC Bank Midwest Decision (Part II-A-2); OCC NationsBank/Maryland National Decision (Part II-B-1); OCC First Fidelity/New Jersey Decision (Part II-B-1).

Moreover, in the Riegle-Neal Act, Congress made this understanding explicit in its amendments of sections 30 and 36. In the language of section 30, as it now reads, it is clear that national banks keep their existing branches when they relocate their main offices. In the Act, Congress placed a new limitation on a relocating national bank's authority to keep branches in the State of its former main office. Henceforward, from June 1, 1997, a relocating national bank will be able to keep such branches only in accordance with the branching rules in new section 36(e)(2). See Riegle-Neal Act §§ 102(b)(2) (adding new subsection (c) to section 30) & 102(b)(1)(B) (adding new subsection (e)(2) to section 36). The legislative history reiterates the statutory language. See H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (August 2, 1994). The Riegle-Neal Act and the Conference Report are also discussed in Part II-C below. From the amended statutory language and its legislative history, it is clear Congress understood that under existing law a national bank can move its main office across state lines while keeping branches in its former state and that this existing law is being changed and limited only by the express congressional action in the amendments. See OCC Bank Midwest Decision (Part II-A-2e) (further analysis of this aspect of Riegle-Neal Act).

Accordingly, after the relocation of its main office to Texarkana, Texas, CNB's continued operation of its existing branches in Arkansas is legally authorized.

B. After the Relocation, CNB may Establish a Branch at the Site of its Former Main Office in Texarkana, Arkansas, under 12 U.S.C. § 36(c).

After the relocation, CNB will be an interstate national bank, with its main office in Texarkana, Texas, and branches in

Texarkana, Arkansas. In the Branch Application, CNB has applied to establish a branch at the site of its former main office in Texarkana, Arkansas, under 12 U.S.C. § 36(c). This Branch Application thus involves an application by an interstate national bank for an additional branch in one of the states in which it already has branches. The OCC has previously considered section 36(c) in the context of branches by interstate banks. Applying the same analysis to this Branch Application, we find that the proposed branch is legally authorized under 12 U.S.C. § 36(c).

> The McFadden Act authorizes a national bank to establish new branches
>
> at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question ....

12 U.S.C. § 36(c)(2). The issue, then, is the interpretation of the phrase "the State in which said association is situated" as applied to national banks that have offices in more than one State. In particular, the issue is whether, after the main office relocation, CNB is "situated" in Arkansas by virtue of its existing branches there.

This question has been considered before by the OCC and the courts. The interpretation of the statute adopted since at least 1974 has been that, for the purpose of establishing additional branches under section 36(c), an interstate national bank is "situated" in each state in which it has its main office or a branch: The bank can establish other branches in each state to the same extent that state allows its state banks to have branches. See Seattle Trust & Savings Bank v. Bank of California. N.A., 492 F.2d 48 (9th Cir. 1974), cert. denied, 419 U.S. 844 (1974). The OCC has applied this principle from Seattle Trust in prior decisions involving national banks with operations in more than one state. See OCC Bank Midwest Decision (Part II-B); OCC

NationsBank/Maryland National Decision (Parts II-B-2 and III); OCC First Fidelity/New Jersey Decision (Parts II-B-2 and III). See also OCC decisions listed in notes 2 and 3 above.

This issue was fully addressed in the Seattle Trust case involving the Bank of California. The Bank of California is a national bank with its main office in San Francisco and branches in California. It also has grandfathered branches in Seattle, Washington, Tacoma, Washington, and Portland, Oregon. In 1970 it applied to the OCC for approval to establish a new branch in Seattle. The OCC approved the branch, concluding that the Bank of California was situated in Washington for purposes of section 36(c) because of its grandfathered branches and so could establish other branches in Washington as Washington law allowed Washington banks to do.

The Ninth Circuit affirmed this conclusion. The legislative history contained nothing that illuminated congressional intent on the meaning of "situated" in section 36(c). See Seattle Trust, 452 F.2d at 51. As a guide to interpretation, the court then considered other sections of the National Bank Act that refer to banks which are "situated in" or "located in" certain geographic areas and that, like section 36(c), refer to State law of the state in which the bank is located or situated. The court observed that for institutions like the Bank of California with a multi-state branch network, such statutes would function properly only if the bank operations of a branch were controlled by the law of the state in which that branch was located. With respect to section 36(c), the court concluded there was no basis to give the word "situated" a different meaning than "situated" or "located" had in the other sections. The court expressly held that the Bank of California was "situated" in Washington for section 36(c) purposes through its grandfathered branch. 492 F.2d at 51.

The OCC has consistently applied this interpretation of "situated" in section 36(c) -- that a bank is situated in the state(s) where it has branches as well as the state of its main office. This

statutory language and interpretation continue after the Riegle-Neal Act. Existing branch authority in sections 36(a), 36(b), and 36(c) is not changed in the Riegle-Neal Act. The statutory language and legislative history clearly contemplate that existing authority under these provisions remains in effect. First, the new provision on exclusive authority for additional branches (new subsection 36(e)) is not effective until June 1, 1997. In addition, even after it is effective, it expressly does not apply in states in which the bank has its main office or already has a branch; and it also expressly includes, as a continuing source of authority, branching authorized "under this section" (i.e., Revised Statutes § 5155, which includes existing subsections 36(a), (b) & (c)). See Riegle-Neal Act § 102(b)(1) (adding new subsection (e) to section 36)[4].

The Seattle Trust case also dealt with a related issue that is relevant to these Applications. Like the Arkansas branching statute today (discussed below), the Washington State branching statute then expressed the branching powers of state banks by reference to the bank's "principal place of business." In pertinent part, the Washington statute then read: "No bank or trust company shall establish or operate any branch in any city or town outside the city or town in which its principal place of business is located ...." Wash. Rev. Code § 30.40.020 (1970) (quoted in Seattle Trust, 492 F.2d at 52). The Bank of California had branches in Tacoma and

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[4]Indeed, the section of the Riegle-Neal Act that sets out the new source of interstate branching authority in the new interstate merger transaction provides that interstate banks formed under its provisions ("section 44 interstate banks") have a similar rule covering the establishment of additional branches by section 44 interstate banks within each state in which they have existing branches. See Riegle-Act § 102(a) (new section 44(d)(2)). Finally, the provisions in the Riegle-Neal Act regarding state opt-in to permit interstate branching through de novo branches apply only to the de novo establishment of a bank's first branch in another state (other than the bank's home state) "in which the bank does not maintain a branch." See Riegle-Neal Act § 103(a) (adding new subsection 36(g)). It does not apply to situations where a bank is establishing a new branch in its home state or in one of the states in which it already has a branch. In those situations, existing law under section 36(c) still applies.

Seattle, Washington. It applied to the OCC to establish another branch within the city of Seattle. Some of the opponents to that application argued that Bank of California's principal place of business was in San Francisco, not Seattle, and so it was not authorized under the Washington branching provision to have another branch in Seattle. The OCC determined, and the Seattle Trust, court agreed, that -- in applying section 36(c) for the interstate bank -- its current Seattle office would be deemed its "principal place of business" for purposes of the Washington statute. See 492 F.2d at 52-53.

Indeed, this is a necessary corollary to the primary holding in the case that an interstate national bank is situated for section 36 purposes in each state in which it has a branch. Many state branching laws describe state bank branching powers with reference to the bank's "principal place of business," "principal banking office," "home office," "main office," or a similar term. (E.g., a bank can have branches in the same city as, or in the same county as, the bank's principal office.) In the case of an interstate national bank with branches in such a state, if one of the branches were not treated as the principal office for purposes of further in-state branches, then one of two questionable results would occur. Either the bank would have unlimited further branching powers within the state (even beyond in-state geographic limits that state law may impose) because the bank is "situated" in the state and could be thought situated within every branching unit allowed by state law, since it has no specific location. Or the bank would have no further branching authority within the state because it does not qualify under the state's branching statute since it has no principal office in the state. The first result appears inconsistent with one of the purposes of section 36 to allow states to determine branching within the state. The second result contradicts the decision in Seattle Trust and the holding that the bank is situated in each state. Thus, the interpretation that one of the branches in the state is

treated as its principal office in that state for purposes of state branching law is reasonable.[5]

Therefore, after the main office relocation, CNB continues to be situated in Arkansas for section 36(c) purposes by virtue of its existing branches there. Under Arkansas law, Arkansas banks are permitted to establish branches, inter alia, "anywhere within the county in which the establishing bank's principal banking office is located." Ark. Code Ann. § 23-32-1202(b)(1) (Michie 1993). Although CNB's main office will be in Texarkana, Texas, the bank is considered -- in order to incorporate state branching location limits under section 36(c) -- to have its "principal place of business" in Miller County (the county in which its existing branches are located) for purposes of applying Arkansas branching law to its branching within Arkansas. See Seattle Trust, 492 F.2d at 52-53 (adopting this usage for "principal place of business" in similar Washington statute). The proposed branch location at the site of the former main office in Texarkana, Arkansas, is also within Miller County. An Arkansas bank with its principal place of business within Miller County could establish a branch at that location. Accordingly, CNB may establish a branch at that location under 12 U.S.C. § 36(c).[6]

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[5]A similar outcome appears contemplated in the Riegle-Neal Act. After an interstate merger under the provisions of the Riegle-Neal Act, the section 44 interstate bank will have its main office in one state and branches in its other states. After the interstate merger, the Act provides that the section 44 interstate bank may establish additional branches at any location where any bank involved in the transaction could have established branches under applicable law if such bank had not been a party to the section 44 interstate merger. See Riegle-Neal Act § 102(a) (new section 44(d)(2)). In states in which the branching law is expressed by reference to a "principal office," this seems to imply that the former principal office of the merged bank (which office is now a branch of the interstate bank) will be deemed the principal office for additional in-state branching purposes.

[6]The establishment of the branch at the former main office site is also authorized under section 36(c) through the additional state law branching authority in Ark. Code. Ann. § 23-32-1202(b)(2) (a bank that relocates its principal banking office may continue to use former principal office location as a branch).

C. Congress Re-affirmed this Existing Authority for National Banks under Federal Law in the Statutory Language and Legislative History of the Riegle-Neal Act.

Our analysis of the legal authority for these Applications is based on current law, in particular 12 U.S.C. §§ 30 & 36(c). The recently enacted interstate banking and branching legislation does not change the legal analysis and result, and indeed has confirmed it. See Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (enacted September 29, 1994) (the "Riegle-Neal Act"). The Riegle-Neal Act adds a new section 44 to the Federal Deposit Insurance Act that authorizes certain interstate branching transactions beginning on June 1, 1997. It also makes conforming amendments to the provisions on mergers and consolidations of national banks (adding a new section that follows 215 and 215a) and to the McFadden Act (adding a new subsection 36(d)) that add merger and branching provisions for national banks to correspond to the section 44 transactions. See Riegle-Neal Act §§ 102(b)(1)(B) & 102(b)(4).

The statutory changes and legislative history of the Riegle-Neal Act shows that Congress was completely aware of the OCC's prior interstate main office relocation decisions. Those decisions involved the OCC's interpretation and application of sections 30, 36, and 215a in the manner set forth above. See OCC NationsBank/Maryland National Decision; OCC First Fidelity/New Jersey Decision. In addition, other OCC decisions prior to the Riegle-Neal Act also had involved similar issues and analysis. See OCC decisions listed in notes 1 & 2 above. In the Riegle-Neal Act Congress did not change these sections or express any disagreement with OCC's interpretation and application of them (except for the change to branch retention under section 30 discussed below). And even the change in branch retention under section 30 does not occur until June 1, 1997. The fact that Congress, during legislation in which it was comprehensively considering interstate branching, left these statutes and OCC interpretation of them unaffected is

conclusive evidence that the intended meanings of sections 30, 36, and 215a in the interstate context are those previously expressed by the OCC and set out above. Our analysis of the relationship of the Riegle-Neal Act to existing law was discussed in more detail in the OCC Bank Midwest Decision (Part II-D), and only a summary will be presented here.

Congress did not alter existing authority in sections 36(a), 36(b) and 36(c) or in sections 215 and 215a. The statutory language and legislative history clearly contemplate that existing authority under these provisions remains in effect. First, the language of these sections is not changed. Second, the legislative history contains no indication of any intent to modify the operation of these sections. Third, nothing in the new sections added in the Riegle-Neal Act necessarily conflicts with any authority in these sections. For example, the provision on exclusive authority for additional branches (subsection 36(e)) is not effective until June 1, 1997. In addition, even after it is effective, it expressly does not apply in states in which the bank has its main office or already has a branch; and it also expressly includes, as a continuing source of authority, branching authorized "under this section" (i.e., Revised Statutes § 5155, which includes subsections 36(a), 36(b), and 36(c)). See Riegle-Neal Act § 102(b)(1) (adding new subsection (e) to section 36).

The Riegle-Neal Act also does not change section 30 with respect to the power to change the location of the main office across a state line. But it does change sections 30 and 36 with respect to the power of the bank to keep existing branches in the state from which it relocated. See Riegle-Neal Act §§ 102(b)(1) (adding new subsection (e) to section 36) & 102(b)(2) (adding new subsection (c) to section 30). However, this change to the authority to continue existing branches in a relocation does not take effect until June 1, 1997

The legislative history of these changes is especially illuminating. The Conference Report expressly shows that

Congress was aware of existing authority and of OCC analyses and approvals under that authority (such as the OCC NationsBank/Maryland National Decision, the OCC First Fidelity/New Jersey Decision, and the other decisions cited in notes 1 and 2 above) and expected it to continue until June 1. 1997:

> The Comptroller of the Currency (OCC) has used the 30 mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices. Section 102(b)(2) amends the provision so that after June 1, 1997, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State....
>
> The Conferees are aware of the OCC procedures in permitting relocation across state lines. The Conferees concur with those procedures. including the application of appropriate State law and authority. The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (August 2, 1994) (emphasis added). This statement clearly shows a Congressional understanding that under existing law a national bank can move its main office across State lines while keeping branches in its former State and that this existing authority is being changed by the amendment. We believe the reference in the Conference Report to the OCC's prior decisions includes all

aspects of the prior decisions, and not merely the analysis of main office relocation and branch retention under section 30. If the other aspects of the legal analysis in the prior decisions (i.e., the issues raised under sections 36 and 215a) were not also valid, the final results in those decisions would not have been legally authorized. In that event, Congress' concurrence in the decisions would have been a nullity.

Thus, these Applications are authorized under existing federal law for national banks. In the Riegle-Neal Act, Congress confirmed that existing authority, changed the authority under section 30 beginning June 1, 1997, and understood that transactions such as this one would occur until that date.

D. State Laws that Conflict with Federal Law Conferring this Authority on National Banks Cannot be Applied to Prevent or Restrict these Applications.

As we have seen, the transactions proposed by CNB in these Applications are authorized under federal law. The Arkansas and Texas Banking Commissioners have objected to them, raising both legal issues under state laws and policy concerns. Some of these objections are similar to those raised by the Kansas Bank Commissioner with respect to a transaction in Kansas. See OCC Bank Midwest Decision. That Decision should also be consulted for a fuller discussion of state law issues.

The Arkansas Commissioner states that the Arkansas Code does not provide for or permit interstate branching and therefore, the approval of CNB's Applications -- which would allow CNB to maintain branches in Arkansas after the main office is in Texas -- "would clearly be in contravention of state law." Arkansas Commissioner Letter at 2. The only provision of the Arkansas Code to which the Commissioner refers is the provision governing branching by Arkansas-chartered banks, in particular the provisions that limit branches to locations within Arkansas:

> 23-32-1202. Establishment of full service branch offices -- Locations.
>
> (a) No banking institution shall engage in the business of banking at any location other than at a principal banking office or branch bank in this state except as otherwise permitted by law.
>
> .....
>
> (b)(4) After December 31, 1998, a bank may locate one (1) or more full service branches and customer-bank communications terminals anywhere in this state.

Ark. Code Ann. §§ 23-32-1202(a) & (b)(4) (emphasis supplied by Commissioner). However, this provision is the provision for branching by Arkansas-chartered banks. It apparently authorizes Arkansas banks to have branches only in Arkansas. But it does not address at all whether out-of-state banks can have branches in Arkansas.

Moreover, the Commissioner appears to assume that a national bank in CNB's position can have branches in Arkansas only in accordance with express state law, and that the absence of such express Arkansas authority for interstate branches means that CNB's branches are unlawful. However, this is incorrect as a matter of law for several reasons. First, the authority of CNB to have branches in Arkansas is determined by federal law, not state law. CNB may retain the branches in Arkansas in its main office relocation under the authority of 12 U.S.C. § 30, and state law is not a factor under section 30 at all; and so the branches in Arkansas are retained without any consideration of either Arkansas or Texas law. See, e.g., Ramapo Bank, 425 F.2d at 344, McEnteer, 644 F.Supp. at 292-93; OCC Bank Midwest Decision (Parts II-A, II-D, III). CNB may establish the former main office (and additional branches) as a branch in

Arkansas under 12 U.S.C. § 36(c). While state law is a factor under section 36(c), the state law incorporated therein is the law for branching within Arkansas by Arkansas state banks because CNB is situated in Arkansas for section 36 purposes. See, e.g., Seattle Trust, 492 F.2d at 51; Parts II-B and II-C above; OCC Bank Midwest Decision (Parts II-B, II-D). It is federal law, not state law, that sets the authority for national bank branches. Although some aspects of state law are incorporated into federal law, it is federal law that determines which aspects of state law are so incorporated, and in what manner they are incorporated. Under Seattle Trust, the manner in which Arkansas law is relevant is the state branching provision for branching within Arkansas by Arkansas banks. Moreover, this interpretation of sections 30 and 36 was expressly approved by Congress in the Riegle-Neal Act.

Even if Arkansas had a state law that expressly prohibited out-of-state banks from having branches in Arkansas (or if section 23-32-1202(a) were interpreted to be such a law), such a state law could not constitutionally be applied to prevent these proposed transactions. The state law would conflict with the authority granted to national banks under federal law in 12 U.S.C.§§ 30 & 36, and so it would be preempted. See, e.g. Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-94; OCC Bank Midwest Decision (Part III-A). In addition, it would impose an impermissible burden on interstate commerce because it bars out-of-state businesses from entry into Arkansas and does so without congressional authorization, and so it would violate the Commerce Clause. See OCC Bank Midwest Decision (Part III-B).[7]

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[7]This analysis applies equally to CNB's brick-and-mortar branches and to customer-bank communications terminal branches. Under Arkansas law, "[n]o bank organized under the laws of, or having its main office in, any other state may establish, maintain, or operate a customer-bank communications terminal in this state." Ark. Code Ann. § 23-32-1305. Since CNB continues to be situated in Arkansas, under Seattle Trust it would be considered to have a "main office"

The Texas Banking Commissioner raises an objection similar to that of Arkansas. She maintains that under Texas branching law Texas state banks are authorized to establish branches only within Texas and there is no authority for Texas banks to have branches in another state.[8] She then asserts that CNB, once it has relocated its main office into Texas, has only the branching authority that a Texas state bank would have, and therefore the maintenance of branches in another state, in this

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in Arkansas for in-state purposes under section 23-32-1305, see 492 F.2d at 52-53 (discussed above on pages 7-8), and so it would comply with section 23-32-1305. But, if section 23-32-1305 were construed such that CNB was considered an out-of-state bank, then application of the statute to CNB would be invalid under federal law, for the reasons discussed above.

[8]The Texas statute provides in pertinent part:

> Art. 342-903. Branch Banking
>
> Sec. 1 (a) A state bank may engage in the business of accepting demand deposits and making commercial loans at its principal banking office and at any other approved branch office location.
>
> . . . .
>
> (c) Branch offices may be established anywhere in the state on prior written approval of the Banking Commissioner. . .

Tex. Rev. Civ. Stat. art. 342-903(1)(a) & (c) (West 1994) (emphasis added by Commissioner). The Commissioner's Letter refers only to subsection (1)(c). It is not clear that Texas state banks do not have power to have branches in other states. The grant of authority in subsection (1)(a) does not have an in-state limitation. Subsection (1)(c) appears to be a procedural provision that branches in the state can be opened only with prior approval of the Commissioner. It also sets out provisions for approval standards, application fees, and application forms. The in-state limitation appears only there. Since CNB would not be subject to an in-state limit on Texas state banks in any event, it does not matter whether Texas state banks have the power to have branches in Arkansas or not; and so we need not address that issue further.

case Arkansas, would be in contravention of the Texas branching statute. See Texas Commissioner Letter at 1. The Texas Commissioner makes the same incorrect assumption about governing law as the Arkansas Commissioner. National banks' branching authority is not subject to state law, but to federal law. While federal law incorporates state law provisions to some extent, it is federal law that is the governing law, and it is a federal determination what (and how) state provisions apply.

Here, CNB is not subject to Texas law; it is subject to 12 U.S.C. §§ 30 & 36(c). The authority of CNB to have branches in Arkansas is determined by federal law, not state law. CNB may retain the branches in Arkansas in its main office relocation under the authority of section 30, and state law is not a factor under section 30 at all; and so the branches in Arkansas are retained without any consideration of either Arkansas or Texas law. See, e.g., Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-93; OCC Bank Midwest Decision (Parts II-A, II-D, III). CNB may establish the former main office (and additional branches) as a branch in Arkansas under 12 U.S.C. § 36(c). While state law is a factor under section 36(c), the state law incorporated therein, for the branches in Arkansas, is the law for branching within Arkansas by Arkansas state banks, not Texas law for branching by Texas banks, because CNB is situated in Arkansas for section 36 purposes. See, e.g., Seattle Trust, 492 F.2d at 51; Parts II-B and II-C above; OCC Bank Midwest Decision (Parts II-B, II-D). It is federal law, not state law, that sets the authority for national bank branches. Although some aspects of state law are incorporated into federal law, it is federal law that determines which aspects of state law are so incorporated, and in what manner they are incorporated. Under Seattle Trust, for subsequent branches in Arkansas, the relevant state law is the Arkansas branching provision for branching within Arkansas by Arkansas banks, not Texas law; Texas law is relevant for subsequent branching by CNB in Texas. Moreover, this

interpretation of sections 30 and 36 was expressly approved by Congress in the Riegle-Neal Act.

The Texas Bank Commissioner also claims the relocation of CNB into Texas would cause Commercial Bancshares to be in violation of Texas bank holding company provisions. Under Texas law, an out-of-state bank holding company may acquire a bank located in Texas, but until the year 2001, this authority is available only if, inter alia, each bank in Texas to be owned by the out-of-state holding company has existed and continuously operated as a bank for at least five years. See Tex. Rev. Civ. Stat. art. 342-916 (West 1994).[9] The Commissioner claims CNB would not qualify as a bank in Texas that has been continuously operated for a period of five years. Thus, Commercial Bancshares would not be in compliance with Article 342-916.

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[9]The Texas statute provides in pertinent part:

> Art. 342-916. Out-of-State Bank Holding Companies--Authorization--Limitations
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> Sec. 1. Except as otherwise provided by this article, an out-of-state bank holding company may, directly or indirectly, acquire or acquire control of a state bank, national bank located in the state, or bank holding company owning or controlling, directly or indirectly, a state bank or national bank located in the state.
>
> Sec. 2. (a) Before September 1, 2001, the authority granted by Section 1 of this article is available to an out-of-state bank holding company only if each state bank or national bank in this state that would, on the effective date of the transaction, be owned or controlled, directly or indirectly, by the out-of-state bank holding company:
>
> (1) existed [before July 15, 1986 . . .]; or
>
> (2) has existed and continuously operated as a bank for a period of at least five years.

Tex. Rev. Civ. Stat. art. 342-916 (West 1994).

However, this is legally incorrect for several reasons. First, Article 342-916, by its own terms, does not apply to this transaction. Article 342-916 applies to an out-of-state holding company's acquisition of a bank in Texas. Commercial Bancshares already owns CNB, and so it is not making an acquisition. There does not appear to be a definition of "acquire" in the Texas bank holding company provisions. But, the Texas application procedures are triggered only when an application is made under section 3 of the federal Bank Holding Company Act (12 U.S.C. §1842). See Tex. Rev. Civ. Stat. art. 342-912, sections (1) and (4) (West 1994). Thus, it is likely that the meaning of the similar terms in the Texas statute follows that in the federal statute. The relocation of a national bank's main office is not an acquisition on the part of the holding company under the federal BHCA. See e.g., Synovus Financial Corporation, 952 F.2d at 434-37; OCC Bank Midwest Decision (Part II-A-1-c). Thus, it is not an acquisition for the Texas statute as well. Moreover, since the Texas procedures are applicable only when there is a federal application, when there is no federal application required (as here), the Texas statute does not apply.[10]

Second, the relocation of a national bank's main office is governed exclusively by 12 U.S.C. § 30, and any state law that conflicts with the authority granted is preempted. See, e.g., Ramapo Bank, 425 F.2d at 344; McEnteer, 644 F.Supp. at 292-94; OCC Bank Midwest Decision (Parts II-A-1-c and III-A).

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[10]Moreover, even if Article 342-916 applied, it is not clear that CNB would not qualify under it. CNB has been in existence and continuously operated as a bank for more than five years. The Texas statute does not expressly require that the bank have been in operation in Texas for five years. Cf. Synovus Financial Corporation, 952 F.2d at 430-31 (Board's interpretation of similar five year requirement in Georgia statute).

Thus, even if Article 342-916 purported to apply to this transaction, it would be preempted.[11]

Third, if Article 342-916 purported to apply to this transaction, it would also violate the Commerce Clause. As discussed above, the relocation is not subject to section 3(a) of the federal BHCA, and thus it is also not within section 3(d) (the Douglas Amendment). Therefore, with respect to this transaction, the Texas statute would be operating outside the congressional authority granted the states in the Douglas Amendment. See OCC Bank Midwest Decision (Part III-B-1). Without that authority from Congress, a state statute forbidding out-of-state companies from owning a business in Texas is a clearly impermissible burden on interstate commerce, and thus violates the Commerce Clause. See e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 37-44 (1980); McEnteer, 644 F.Supp. at 294; Kansas Attorney General Opinion No. 94-128 (September 21, 1994); 69 Maryland Op.

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[11]In reviewing the preemption issues in this corporate application, we have not used the notice and comment procedures added in the Riegle-Neal Act for preemption determinations involving state laws in the areas of community reinvestment, consumer protection, fair lending, and establishment of intrastate branches. See Riegle-Neal Act § 114 (adding new Revised Statutes § 5244). First, the Texas bank holding company provision is not within one of the four areas. While the Texas and Arkansas branching provisions are intrastate branching provisions, but they are not being preempted with respect to intrastate branching within each state. Second, even if the determinations here were within one of the four areas, court cases and prior OCC decisions have previously addressed the preemptive effect of section 30 and the application of section 36(c) for interstate banks. Thus, this matter would qualify for the exception in section 5244(c)(1)(A). Third, it is not clear that the new procedure in the Riegle-Neal Act covers matters that do not arise in an opinion letter or interpretive rule, but in a corporate application decision in a process that has its own public notice and comment requirement. Finally, the preemption determinations here are secondary. The primary conclusions are that these state statutes do not apply in a way that would prevent this transaction. It is only if the statutes were otherwise interpreted that the preemption analysis occurs.

Att'y Gen. 37, 45-49 (1984); OCC Bank Midwest Decision (Part III-B-2).

Both the Arkansas Bank Commissioner and the Texas Bank Commissioner also point to the Riegle-Neal Act for further support of their positions. They maintain the Act reserves to the states the authority to determine whether each state will permit interstate branching and that the approval of CNB's Applications thus would contravene the authority the Act gives the states. The Commissioners are reading the Act too broadly. In the Riegle-Neal Act, Congress has provided an additional authority for interstate mergers in the new section 44 of the Federal Deposit Insurance Act. Congress also provided that a state can "opt-out" of section 44 interstate mergers by enacting appropriate state legislation. See Riegle-Neal Act § 102(a) (new section 44(a)(2)). Congress also provided that de novo establishment of an out-of-state bank's first branch in a state could occur only if the state allowed it. See Riegle-Neal Act § 103. However, Congress also left existing relocation, merger, and branching authority in place. Interstate transaction that occur under existing authority are unaffected (except for changes to section 30 that begin on June 1, 1997). There is no evidence of an intent to give states any authority over them. Indeed, as discussed above in Part II-C, Congress was expressly aware of interstate transactions involving section 30 and expected them to continue until June 1, 1997. Thus, the Commissioners' contention that approval of CNB's Applications would violate the Riegle-Neal Act is incorrect.

Finally, the Commissioners' references to the Riegle-Neal Act also include a policy-based objection, as well as a legal one. They suggest that approval of these Applications would be outside the "opt-out" process outlined in the Act and so would be contrary to the desires of Congress. They imply that approval might affect the states' deliberations whether to opt out. However, although Congress granted the States the power to "opt out" of the interstate mergers authorized in section 102 of

the Act, the Act also specifically contemplates that existing interstate main office relocation authority remains in effect until June 1, 1997, and Congress expressly expected the OCC to continue to follow existing law until then, permitting interstate transaction using main office relocations. Therefore, until June 1, 1997, applications filed with the OCC must be reviewed under applicable existing law. It would be inappropriate regulatory policy, and inconsistent with express Congressional intent, to delay action on applications between now and June 1, 1997, a period of more than two years, rather than processing them under current law.

E. Conclusion

In conclusion, our legal analysis of these Applications follows our analysis of prior interstate relocation decisions and other prior decisions involving interstate national banks. The relocation of CNB's main office from Texarkana, Arkansas, to Texarkana, Texas, is authorized under 12 U.S.C. § 30. CNB may continue to operate its existing branches in Arkansas. CNB may also establish a branch at the location of its old main office in Texarkana, Arkansas, under 12 U.S.C. § 36(c). Accordingly, these Applications are legally authorized.

III. ADDITIONAL STATUTORY AND POLICY REVIEWS

The Community Reinvestment Act requires the OCC to take into account the applicant's record of helping to meet the credit needs of its entire community, including low- and moderate- income neighborhoods, when evaluating certain application. See 12 U.S.C. §2903. CNB has received a satisfactory rating from the OCC with respect to its CRA performance. There have been no public comments received by the OCC relating to these Applications that would cause the OCC to question the bank's performance in complying with the CRA.

The relocation and operation of interstate branches should have no adverse affect on the bank's CRA performance. The Texas portion of Texarkana is already part of the bank's service area. The bank will continue to serve the same delineated communities with the same CRA statement, policies, programs, and personnel that it has today. The relocation and operation of interstate branches do not alter the bank's obligation to help meet the credit needs of its community on both sides of the state line.

IV. CONCLUSION AND APPROVAL

For the reasons set forth above, the Relocation Application and the Branch Application are legally authorized under 12 U.S.C. §§ 30 and 36. The transactions also meet the criteria for approval under other statutory factors. Accordingly, these Applications are hereby approved.

_____ _____

Frank Maguire
Senior Deputy Comptroller
for Corporate Activities
and Policy Analysis

Date

Application Control Numbers: 94-SW-07-0036 & 94-SW-05-0120